APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 06-3353
(D.C. No. 04-CV-2218-JAR)

[Filed May 15, 2008]

PITT VESOM, M.D.,	)
Plaintiff - Appellant,	)
	)
v.	)
	)
ATCHISON HOSPITAL ASSOCIATION; RYAN THOMAS, M.D.; DOUGLAS GORACKE, M.D.; DONALD SWAYZE, D.O.,	)
Defendants - Appellees.	)

ORDER AND JUDGMENT*

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before O'BRIEN, BRORBY, and GORSUCH, Circuit Judges.

Dr. Pitt Vesom sued the Atchison Hospital Association and several individual members of the Atchison Hospital Medical Executive Committee when they refused to recommend his medical staff privileges be renewed. Dr. Vesom appeals from summary judgment granted in favor of the defendants. We AFFIRM.

I. BACKGROUND

Dr. Vesom is an American citizen born in Thailand. He maintained medical staff privileges at the Atchison Hospital in Atchison, Kansas, for a substantial period between 1983 through 2003. In 2003, the Association refused to renew his staff privileges, allegedly because he was a "disruptive physician." Vesom sued the Atchison Hospital Association and three individual physicians (collectively, the Hospital), claiming race discrimination under 42 U.S.C. § 1981 and Title VI; conspiracy under 42 U.S.C. § 1985(3); antitrust violations under section 1 of the Sherman Act, 15 U.S.C. § 1; and claims alleging retaliatory discharge and intentional interference with contract under Kansas law.

A. Hospital Bylaws

Atchison Hospital Association is a not-for-profit corporation formed in 1912. Governed under Kansas law, the Association's purpose is to provide quality health care and medical services for the citizens of

Atchison and the surrounding area.[1] To admit and treat patients at the Hospital, a doctor must be an active member of the medical staff. In turn, the physicians and dentists on the medical staff work under the Medical Staff Bylaws which "establish the mechanisms to carry out the direct and delegated responsibilities of the Medical Staff in cooperation with the Hospital Administration and the Governing Board." (R. Vol. II at 493.) The "Governing Board" is the Board of Directors which has "the ultimate responsibility for the operation of the Hospital and for providing patient care." (*Id.*)

The medical staff elects officers to the Medical Executive Committee (MEC). The MEC is comprised of the Chief of Staff, the Vice Chief of Staff, the Secretary/Treasurer, the immediate past Chief of Staff and one "member at large" elected from the active medical staff. According to the Bylaws, the MEC oversees the functions of the medical staff and acts on their behalf, but its authority is limited to "making recommendations to the Governing Board;" and its "actions are not binding until approved by the . . . Board." (*Id.* at 499.)

The MEC's duties include, among others, recommending the acceptance or rejection of an application for medical staff privileges or an application for renewal, required every two years. Once accepted, there is no guarantee staff privileges will be renewed solely because the professional is licensed to practice in Kansas. Only those who meet

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[1] Atchison is a community of approximately 12,000 people.

and maintain the qualifications, standards and requirements of the applicable rules and regulations will be accepted for renewal of staff privileges.

Should the MEC recommend a practitioner's privileges not be renewed, the Bylaws provide a system to challenge the adverse decision. The practitioner must be given written notice containing a statement of the reasons for the action and a description of fair hearing rights. The practitioner can request a hearing before a Fair Hearing Committee consisting of not less than five disinterested outside physicians.

The MEC, the Governing Board and the practitioner may each have legal counsel at the hearing. All parties have the right to offer oral and documentary evidence and to cross-examine the witnesses. According to the defendants, the Fair Hearing Committee is permitted to conduct independent interviews, research and review. It then must issue a report of its findings and recommendations to the Chief Executive Officer (CEO), who forwards the report to the practitioner and the other members of the Board.

Within ten days of receiving the report, the practitioner may request appellate review by the Board on actions of the Hearing Committee "taken arbitrarily, capriciously or with bias" or "not supported by the evidence." The review is limited to the record presented to the Fair Hearing Committee. The Board then issues a final decision.

B. Dr. Vesom's History with the Hospital[2]

Dr. Vesom, a Board Certified internist and cardiologist, was granted privileges at the Hospital in September, 1983. With the exception of a few colleagues, Vesom was excluded from the staff members' social events and activities. Although Vesom was "highly qualified," the majority of the staff members routinely refused to refer their cardiac patients to Vesom's care. (R. Vol. III at 1279.) His wife, a certified pathologist, was unable to find employment with Atchison Hospital.

Dr. Vesom was the Chairman of at least one service section (primarily emergency services) from 1985 through 1995. In 1986, 1987 and 1991, he was a member of the MEC. In June 1996, Dr. Vesom voluntarily resigned and sold his medical practice to be with his family in Thailand.[3] He returned to Atchison in 1998 and requested reappointment. The MEC recommended he not be reappointed and Vesom requested a fair hearing pursuant to the Bylaws.[4] The Governing Board eventually chose not to follow the MEC recommendation and approved Vesom's conditional reappointment upon his approval of an "Agreement and Release." (R. Vol. III at 1026.) The

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[2] The facts are set forth in the light most favorable to Dr. Vesom. *See Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004).

[3] The purchasing group, Mid-America Cardiology Associates, continues to provide cardiology services in Atchison.

[4] In 1998, the MEC was composed of Dr. Goracke (Chief of Staff), Dr. Campbell, Dr. Sontheimer, Dr. Shriwise and Dr. Eplee.

Agreement provided a one-year provisional appointment with proctoring by an independent cardiologist and written reports of his behavior from specific Hospital departments.[5] Vesom also stipulated to a provision recognizing a concern Vesom may engage in future disruptive behavior:

> During his tenure on the Medical Staff, Dr. Vesom shall enjoy all the rights and privileges and be subject to all the rules, restrictions and sanction as may be granted or imposed by the Bylaws upon any physician on the Medical Staff, including but not limited to, any and all section thereof governing or relating to "Disruptive Physicians."

(R. Vol. III at 1030.) Vesom's next reappointment request in 2001 was approved without incident and he was granted privileges for two years.

In December 2002, Vesom submitted a Reappointment Information Form and other documents for his 2003 reappointment. Each renewal packet included an Authority and Liability Waiver which states:

> I further waive any rights under Educational Rights and Privacy Act or any statute granting immunity to such Boards or Committees and further agree to hold harmless such President, Board or Committees evaluating my application

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[5] The departments included Social Services, Nursing, Emergency Room and the Intensive Care Unit.

> from any claim or action by or on my behalf in the event such application for reappointment is denied for any reason.

(R. Vol. II at 565.) At the time Vesom applied for renewal of his privileges, the MEC consisted of Dr. Goracke (Chief of Staff), Dr. Swayze (Vice Chief of Staff), Dr. Jones (Secretary/Treasurer), Dr. Rider (member at large), and Dr. Thomas (past Chief of Staff).

Shortly before the MEC met to consider Vesom's renewal application, he and two other staff physicians, Dr. Ware and Dr. Tayiem, made complaints regarding the Hospital's peer review process concerning one of Dr. Thomas' patients.[6] On January 3, 2003, these three doctors met with Dr. Goracke and the CEO of the Hospital, Virgil Bourne, to discuss their complaints. On January 22, 2003, Vesom, Ware and Tayiem sent their complaints in a letter to the Board of Directors of the Hospital. One day later, a special meeting of the Board was convened to discuss "pressing medical staff issues." (R. Vol. III at 1177.) In attendance were Board members Bourne, Goracke and the Hospital's legal counsel, Andrew Ramirez. The only action taken was to terminate the Hospital's agreement with Dr. Ware.

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[6] Dr. Tayiem is a Palestinian physician who joined in the complaints regarding the peer review process. Tayiem remains in active status at the hospital and was a member of the MEC during the discovery period.

C. Denial of Privileges

In February 2003, the MEC met and determined it would recommend Dr. Vesom's renewal of privileges be denied and Ware's provisional privileges be terminated. Eventually, the reasons given for denial were based on the "disruptive physician" provisions of the Bylaws. These provisions prohibit:

> 1. attacks (verbal or physical) leveled at individuals, Hospital personnel or patients which are personal, irrelevant or go beyond the bounds of fair professional conduct;
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> . . .
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> 3. non-constructive criticism addressed to its recipient in such a way as to intimidate, undermine confidence, belittle or imply stupidity or incompetence;
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> 4. refusal to accept Medical Staff assignments, or to participate in committee or departmental affairs on anything but his or her own terms or to do so in a disruptive manner;
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> . . .
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> 7. verbal or physical threats of retribution, litigation or violence directed at individuals, Hospital personnel or patients; or

8. use of foul, abusive language.

(R. Vol. I at 150-51.) On February 18, 2003, Bourne sent Drs. Vesom and Ware identical letters notifying them of the MEC's adverse recommendation based on the conclusion they were disruptive physicians. On February 24, 2003, Goracke, Bourne and Ramirez met with the Board. The minutes of this meeting state:

> The Executive/Credentials Committee further informed the Board of their recommendation to give David Ware . . . notice of Termination of Provisional Active Staff Status and Privileges effective March 18, 2003. They also informed the Board of their recommendation to notify Pitt Vesom . . . of Termination of Active Staff Privileges effective March 18, 2003.

(Vol. III at 1179.) The Board then met in executive session with the Hospital's attorney and the risk manager.

Vesom requested a Fair Hearing on March 6, 2003. Bourne responded with a letter delineating the specific charges made against Dr. Vesom, an itemized listing of the information used by the MEC in reaching its recommendation (Vesom's Credentials File), and the witnesses expected to testify in support of the charges. Vesom claims it was at this time he realized the MEC would present alleged instances of disruptive conduct but would not include exculpatory information and documents. Prior to the Fair Hearing, he was provided with copies of all the written exhibits that would be used to support the charges. The hearing ultimately took place on January 24, 2004. Both the Hospital and

Vesom were represented by attorneys and both parties were permitted to offer testimony and evidence in support of their positions. The Fair Hearing Committee, a panel of five independent doctors, was allowed to ask questions of their own. Understanding its role was to determine whether the MEC's decision was "arbitrary, unreasonable or capricious," the Fair Hearing Committee unanimously determined the evidence demonstrated Vesom had exhibited a "pattern of disruptive behavior." (R. Vol II at 731, 739.) Vesom requested appellate review before the Board, which took place on March 25, 2004. The Board affirmed the decision of the Fair Hearing Committee and the MEC on April 2, 2004.

Throughout the appeal process, Dr. Vesom maintained active medical staff privileges at the Hospital. Afterward, he obtained privileges at Cushing Hospital, approximately 25 miles away. In September 2004, Vesom accepted an offer to practice at a hospital in Poplar Bluff, Missouri.

Dr. Vesom filed this action against the Hospital and Drs. Thomas, Goracke and Swayze. Dr. Vesom claims these doctors conspired to deny him privileges and preclude him from practicing in the community because he is Asian and he had reported incidents of professional incompetence committed by other doctors. He asserted discrimination under 42 U.S.C. §§ 1981 and 1985, and Title VI of the Civil Rights Act of 1964. He also claimed violations under the Sherman Act, Kansas public policy (whistle-blowing) and intentional interference with business relationships. The district court granted summary judgment on all claims.

On appeal, Vesom raises numerous issues. As to his claims of racial discrimination, he contends the district court erroneously determined the Hospital Bylaws did not create a contract and there was no factual issue whether the Hospital's stated reasons for its actions were pretextual. In large part, he maintains the court's ruling on pretext was due to the court's arbitrary evidentiary rulings. He further contends the district court erred in granting summary judgment on his Sherman Act claim, and his state law whistle-blower and interference with business relationship claims. Finally, he argues the waiver contained in his renewal packet did not preclude his lawsuit.

II. DISCUSSION

We review the district court's grant of summary judgment de novo. *See Stover,* 382 F.3d at 1070. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In conducting our analysis, we view all of the facts and draw all reasonable inferences from the record in favor of the non-moving party. *See Stover,* 382 F.3d at 1070.

A. Evidentiary Rulings

Dr. Vesom claims the district court failed to recognize the existence of a material issue of fact due to its refusal to consider important admissible evidence. Accordingly, we begin with the evidentiary

challenges. "Evidentiary rulings are committed to the discretion of the trial court, and we review them only for abuse of discretion. Our review is even more deferential where the evidentiary ruling concerns the admissibility of what is claimed to be hearsay evidence." *United States v. Ramirez*, 479 F.3d 1229, 1245 (10th Cir. 2007), *cert. denied*, 128 S.Ct. 1074 (2008). "Under this standard, a trial court's decision will not be reversed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Allen v. Sybase, Inc.*, 468 F.3d 642, 659 (10th Cir. 2006).

1. Affidavits

Vesom claims the district court erred in failing to consider statements contained in the affidavits of Dr. Ware, Dr. Rider, Nurse Kathy Jackson and Rosetta Birch, a former respiratory therapist. The court disregarded parts of Ware and Rider's affidavits because the statements were based on inadmissable hearsay or conclusory statements about the feelings and intent of others. It struck the affidavits of Birch and Jackson because Vesom failed to disclose these witnesses until just before his response to the summary judgment motion and offered no justification for the delay.

A. Affidavits of Rosetta Birch and Kathy Jackson

Rosetta Birch is a former respiratory therapist and medical records clerk at the Hospital. Her affidavit was signed on January 13, 2006, shortly before

Vesom's response to the Hospital's motion for summary judgment. One of the instances of Vesom's disruptive conduct involved an allegation that Birch had complained about Dr. Vesom's treatment of a certain patient. Her affidavit contradicted the allegation. In addition, Birch stated she never saw Dr. Vesom "disrupt the flow of care to a patient." (R. Vol. III at 1299.) Her affidavit also stated that on more than one occasion Birch heard the Hospital's Risk Management Officer remark that Dr. Vesom "needs to just go back to where he came from." (*Id.*)

Kathy Jackson, a registered nurse at the Hospital from 1969 until September 28, 2005, signed her affidavit on January 6, 2006. During her last sixteen years at the Hospital, Jackson was the head nurse in the emergency room. She stated certain doctors did not "appreciate[] constructive criticism and often retaliated against those who critiqued hospital procedures or standards" and, contrary to some of the complaints regarding Vesom's behavior to the emergency room staff, she never found him to be abusive or disruptive in the way he handled a situation. (*Id.* at 1301.)

In its reply brief, the Hospital urged the district court to strike these affidavits because neither witness was disclosed in Vesom's original or amended witness lists as required by Fed. R. Civ. P. 26(a)(1) & (e)(1). Rule 37 states a party may not use such evidence unless there is "substantial justification" and the failure to disclose is harmless. Fed. R. Civ. P. 37. According to the district court, the witnesses and their testimony were known to Vesom and "it was feasible . . . to disclose . . . these . . . witnesses some time prior"

to his summary judgment response. (Vol. I at 423.) Because there was no substantial justification and the witnesses were being used to defeat summary judgment, it struck the affidavits.

The exclusion of evidence presented out of time is "automatic and mandatory" unless the violation was either justified or harmless. *Finley v. Marathon Oil Co.*, 75 F.3d 1225, 1230 (7th Cir. 1996). Vesom admits the affidavits were submitted outside the discovery time line and he did not seek to amend his earlier disclosures. Nonetheless, he claims the court erred because the witnesses (at least, Kathy Jackson) were working at the Hospital during much of the discovery phase and were only "willing to come forward and testify" after the discovery deadline had passed. (Appellant's Br. at 35.) He also claims the failure to disclose was harmless because the Hospital could have deposed the witnesses before the reply brief deadline. Vesom complains the district court "elevat[ed] schedules and timetables over the duty to see that justice is done." (Appellant's Reply Br. at 10.) We disagree.

Birch and Jackson were no longer employed by the Hospital for at least three months before their affidavits were signed. There was sufficient time, prior to filing his summary judgment response, to amend earlier disclosures explaining the delay. Instead, Dr. Vesom chose to sandbag. He submitted the affidavits of two new and unannounced witnesses who were available at the time of his Fair Hearing, in an attempt to defeat summary judgment. He offers nothing to support his speculation that these witnesses were not willing to come forward until some time in

2005. Even if true, Dr. Vesom knew they had knowledge of material facts long before then. The admissibility of the affidavits under Rule 56(e) does not remove them from the district court's sound discretion to impose sanctions under Rule 37(c). The district court did not abuse its discretion.

b Affidavits of Dr. Rider and Dr. Ware

The Hospital requested the court strike the affidavits of Drs. Rider and Ware to the extent the declarations were not based on personal knowledge, contained inadmissible hearsay or were merely conclusory statements. The district court granted the motion. Dr. Vesom contends the court misapplied Rule 701 of the Federal Rules of Evidence which permits testimony characterizing the behavior of other members of the MEC as "angry," "hostile" or "retaliatory." *See United States v. Welch*, 745 F.2d 614, 617-18 (10th Cir. 1984) (allowing lay opinion defendant was angry but appeared lucid).

i) Dr. Rider's Testimony

Dr. Rider's testimony was presented in two affidavits and his deposition.[7] Dr. Rider's testimony recounts his attendance as the at-large member of the MEC committee meetings in January and February 2003. He states the other MEC members were "angry" with Dr. Vesom. However, Rider goes further, stating the doctors were angry because Dr. Vesom had voted

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[7] Dr. Rider's deposition was taken on March 29, 2005. He submitted affidavits on August 30, 2004, and January 12, 2006.

for an outside peer review of Dr. Thomas' treatment of a patient and at a later meeting, disputed the peer review's accuracy. Rider also stated the MEC members were angry with Vesom's discussions with Bourne and his letter to the Board concerning the inadequate practices at the Hospital. While Dr. Rider was certainly in a position to observe what he believed to be angry behavior, he does not recount any specific statements that would support his conclusion as to *the reason* for the other members' anger.

In his second declaration, Rider stated the committee members did not discuss specific instances of behavior supporting a conclusion that Dr. Vesom was disruptive prior to the decision to recommend non-renewal. Rather, the determination that Vesom's privileges would not be renewed was a foregone conclusion, bolstered by the Hospital attorney's counsel to the members that their decision could be justified in terms of Bylaw violations. The list of Bylaw violations and the exhibits from Vesom's credential files used at the Fair Hearing were compiled by the Hospital's attorney only after the decision to deny a renewal of Vesom's privileges. The district court considered this testimony.

Dr. Rider concluded, however, "The animus directed at Dr. Vesom by members of the MEC was not the result of disruptive behavior on his part. Rather, it was the result of professional jealousy of a better qualified foreign born doctor whose competition and demanding standards of care were resented by the hospital employed medical staff doctors." (*Id.* at 1296.) Again, he offers no personal observation of specific statements or conduct by the members to support his opinion.

"Under Fed. R. Evid. 701, the testimony of a lay witness in the form of opinions or inferences is admissible if those opinions or inferences are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." *Gossett v. Okla. ex. rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1179 (10th Cir. 2001) (quotations omitted). In *Gossett*, we reversed the district court's rejection of an affidavit which included the opinion of a University instructor that a student was the victim of gender discrimination. We determined the opinion was admissible because:

> [The] affidavit demonstrate[d] . . . her position as an instructor in the Nursing School and on the Admissions Committee provided her with the opportunity to observe firsthand for several years the School's policies and practices with respect to its treatment of male students. Her opinion was a means of conveying her impression based on what she had herself perceived, and it was predicated upon concrete facts within her own observation and recollection.

Id. at 1180.

While Dr. Rider personally witnessed the actions of the MEC and may have formed an opinion from his observations, the district court properly excluded his ultimate opinion – that the decision was based, at least in part, on Vesom's place of birth.

We need not decide if this evidence is inadmissible because it violated Rule 701. Rather, Rider's second affidavit directly contradicts his previous deposition statements under oath.[8] While an affidavit will not be disregarded merely because it conflicts with a prior sworn statement, it deserves no consideration when it "constitutes an attempt to create a sham fact issue." *Burns v. Bd. of County Comm'rs of Jackson County, Kan.*, 330 F.3d 1275, 1282 (10th Cir. 2003).

To determine whether an affidavit is a sham, we consider "whether the affiant was cross-examined during his earlier testimony, whether the affiant had access to the pertinent evidence at the time of his earlier testimony or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain." *Id.* Dr. Rider's deposition was taken on March 29, 2005. He testified in detail regarding the ongoing animosity between the hospital-employed physicians (Thomas, Goracke and Swayze) and the independent physicians (Ware, Rider, Arkom, Growney and Vesom). When asked how Dr. Ware's termination (a non-minority) supported Dr. Vesom's claim of racial discrimination, Dr. Rider responded: "Well, as I say, I think Dr. Vesom's case is -- there may be some element that may be related to

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[8] "[I]t is consistently held that an order or judgment which is correct in ultimate effect will not be disturbed on appeal even though the lower tribunal relied upon a wrong ground or gave an untenable reason for its action. The issue on appeal is the correctness in ultimate effect of an order or judgment, not the reason or reasons given therefor by the trial court." *First Nat'l Bank v. Luther*, 217 F.2d 262, 266 (10th Cir. 1954).

race, but I would consider that a small consideration." (R. Vol. III at 1059.) When later pressed with the question: "So you would agree . . . that race did not play a part in the decision to recommend non-reappointment of Vesom's medical staff privileges," Rider responded: "I really don't have enough information of the thinking of the other members of the staff to make a statement one way or another." (*Id.* at 1063.)

Rider's declaration in response to the Hospital's motion for summary judgment was signed on January 12, 2006. It does not purport to clear up any confusion during the deposition nor does it claim Rider was exposed to new evidence. Therefore, the declaration should be disregarded as a sham or because, as he testified in his deposition, it was not based on Rider's personal knowledge.

ii) Dr. Ware's Testimony

Dr. Ware's declaration was executed on January 12, 2006. The district court struck paragraphs "2, 3, 4, 5, 7 and 8" as hearsay and Dr. Ware's "opinions about the feelings and attitudes of certain physicians towards plaintiff." (R. Vol. I at 424.) Vesom maintains the alleged hearsay statements were admissible as the admissions of party-opponents and Dr. Ware's lay opinion was admissible under Rule 701.

Dr. Ware's declaration states he was recruited to Atchison in July 2002. He recounts an incident shortly after his recruitment where Dr. Bourne gave Ware a tour of the facility. During the tour, Bourne identified Dr. Vesom and stated: "Watch out for him.

He'll stab you in the back!" (R. Vol. III at 1306.) Shortly thereafter, defendant Dr. Thomas told Ware he "hated" Dr. Vesom and "it was no secret." (*Id.*) While golfing with defendant Dr. Goracke, Ware testified Goracke "made disparaging remarks about Dr. Vesom." (*Id.*) Dr. Ware opined that "the feelings and attitudes expressed against Dr. Vesom were, in part, based upon the fact that he was a foreign born doctor coupled with his standard of providing high quality care to his patients."[9] (*Id.*)

We agree the statements of Goracke and Thomas are admissible as the admissions of a party-opponent. Rule 801(d)(2)(A) of the Federal Rules of Evidence provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement, in either his individual or a representative capacity . . . ." But the remainder of Dr. Ware's statements are hearsay. Like Dr. Rider, Dr. Ware fails to present personally observed statements or conduct as the basis for his opinion. Therefore, the district court did not err in excluding this evidence.

2. Documentary Evidence

Vesom maintains the district court erred in refusing to admit documents from his Credential Files

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[9] Ware also stated the Hospital was aware of Vesom's complaints to Kansas health authorities because Ware made comments to various hospital personnel, including Dr. Goracke, prior to the February 2003 MEC meeting, regarding both he and Vesom's intentions to report their complaints outside the Hospital. The district court did not strike this testimony.

for lack of proper authentication. Vesom contends this evidence was admissible on summary judgment because the content of the material would be admissible at trial. *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1203 n.1 (10th Cir. 2000). Further, the parties had stipulated in a pre-trial order that the documents contained in Vesom's Credential Files were business records and could be introduced without further foundation.

As an initial matter, Vesom has failed to point us to the specific documents he believes were erroneously disregarded by the district court. While the record reveals the Hospital did request specific documents be disregarded, not all of those documents have been included in the record. The documents which are available are handwritten or contain handwritten notes – none identify the author. Given this record, we cannot say the district court abused its discretion in failing to consider the pages we have viewed. *See United States v. McClatchey*, 217 F.3d 823, 835-36 (10th Cir. 2000) (to the extent defendant did not cite to the specific evidence in the record, the issue was waived).

In sum, the district court did not abuse its discretion in striking the affidavits of Rosetta Birch and Kathy Jackson. The affidavits of Drs. Ware and Rider regarding their subjective beliefs as to the intent, thoughts or motivations of others were correctly stricken. To the extent the district court disregarded testimony stating certain persons were physically observed to be "angry" or the statements of party-opponents, we will consider such evidence on appeal.

B. Racial Discrimination Claims

When the plaintiff bringing a claim under § 1981[10] and Title VI[11] offers no direct evidence of discrimination, we apply the burden-shifting scheme of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[12] *See Antonio v. Sygma Network, Inc.*, 458 F.3d

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[10] 42 U.S.C. § 1981 provides in relevant part:

> (a) . . . All persons . . . shall have the same right in every State . . . to make and enforce contracts . . . .
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> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

To establish a prima facie case, the plaintiff must show "(1) that the plaintiff is a member of a protected class; (2) that the defendant had the intent to discriminate on the basis of race; and (3) that the discrimination interfered with a protected activity as defined in § 1981." *Hampton v. Dillard's Dept. Stores, Inc.*, 247 F.3d 1091, 1102 (10th Cir. 2004).

[11] Title VI, codified at 42 U.S.C. § 2000d states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[12] We recognize this is not an "employment" action and the parties agree Dr. Vesom's status with the Hospital was as an independent contractor. However, courts routinely follow the *McDonnell Douglas* model when considering claims of racial discrimination brought by non-employees or independent contractors. *See*

at 1177, 1181 (10th Cir. 2006). "Under *McDonnell Douglas,* if the plaintiff can establish a prima facie case of discrimination or retaliation, the burden shifts to the defendant to show a legitimate non-discriminatory or non-retaliatory reason for the adverse employment action." *Id.* "If the defendant meets this burden, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered reason is pretext." *Id.*

Dr. Vesom claims the district court wrongly rejected his claim that the Hospital Bylaws created a contractual interest sufficient to support Vesom's § 1981 claim. The Kansas Supreme Court has not decided the question whether hospital bylaws create a contract and those states which have decided the issue are in disagreement.[13] Fortunately, we need not reach

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Hampton, 247 F.3d at 1107 (non-employee).

[13] Compare *Van v. Anderson*, 66 Fed. Appx. 524, *1 (5th Cir. 2003) (unpublished) ("[S]ection 1981 claims, breach of contract claims, and tortious interference claims all fail as a matter of law. . . . [N]either the medical staff bylaws nor his business relationship with his patients could constitute a contractual relationship upon which liability could be predicated."); *Madsen v. Audrain Health Care, Inc.*, 297 F.3d 694, 699 (8th Cir. 2002) (Missouri courts have held that "hospital bylaws cannot be considered a contract under Missouri law because consideration is lacking."), with *Samuel v. Herrick Mem'l Hosp.*, 201 F.3d 830, 835 n.1 (6th Cir. 2000) (Florida has . . . legislat[ed] that a hospital must promulgate bylaws and those bylaws create a binding contract between the physician and the hospital."); *Marrese v. Deaconess Hosp.*, 966 F.2d 1456, *6 n.8 (7th Cir. 1992) (unpublished) ("[T]he Indiana courts, . . . have recognized that hospital medical staff bylaws can constitute a contract between the hospital and its medical staff.").

this issue of first impression. Assuming for the purposes of this case the Hospital Bylaws created a contract sufficient to support Dr. Vesom's § 1981 claim, and also assuming he has established a prima facie case under both § 1981 and Title VI, he fails to establish the Hospital's proffered reason for its actions was a pretext disguising a racially discriminatory animus.

C. Pretext

Under Tenth Circuit precedent, pretext may be shown by "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997) (quotations omitted). A plaintiff can make a showing of pretext with evidence that the defendant's stated reason for termination was false. *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000). Evidence tending to show pretext permits an inference that the employer acted for discriminatory reasons. *Morgan*, 108 F.3d at 1323. At the summary judgment stage, if a plaintiff advances evidence establishing a prima facie case and evidence upon which a factfinder could conclude that the defendant's alleged nondiscriminatory reasons for the employment decisions are pretextual, the case should go to the factfinder. *Id.* "We do not always require actual evidence of discrimination because, '[i]n appropriate circumstances, the trier of fact can reasonably infer

from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.'" *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1168 (10th Cir. 2007) (quoting *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 147 (2002)).[14] "However, it is not *always* permissible for the factfinder to infer discrimination from evidence that the employer's explanation is unworthy of belief." *Id.* "'[I]f the record conclusively revealed some other, nondiscriminatory reason for the employer's [adverse employment] decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred,' the fact that the employer's explanation was unworthy of belief would no longer be sufficient to create an inference of discrimination." *Id.* (quoting *Reeves*, 530 U.S. at 148).

Dr. Vesom finds it "incredible" that the district court found evidence of a post hoc justification for the denial of his reappointment, yet failed to deny summary judgment. He argues this finding, alone,

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[14] Although *Reeves* spoke in terms of judgment as a matter of law under Fed. R. Civ. P. 50, "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)).

permits an inference that the stated reason for termination "is plainly false and pretextual and ample evidence of mendacity." (Appellant's Br. at 34.) His argument misapprehends his burden. While Dr. Rider's testimony states the four other members of the MEC decided to recommend denial of Vesom's renewal application before they reviewed the Bylaws, Dr. Vesom failed to present any evidence this decision was motivated by racial animus. *See Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 342 (5th Cir. 2002) ("More importantly, even if Dr. Patel could connect these events to his 1999 suspension, he still fails to create a question of fact for the jury that *race* motivated his suspension.").

In *Reeves*, the Supreme Court determined the defendants were not entitled to judgment as a matter of law because "in addition to establishing a prima facie case of discrimination and creating a jury issue as to the falsity of the employer's explanation, petitioner introduced additional evidence that [the employer] was motivated by age-based animus and was principally responsible for petitioner's firing." *Reeves*, 530 U.S. at 151. Dr. Vesom's claims fail on both factors.[15]

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[15] The district court concluded (albeit in the context of Dr. Vesom's Sherman Act claim), the Board independently made the ultimate determination to deny a renewal of Vesom's privileges and there was no evidence suggesting the Board did not act independently in accepting the MEC's recommendation after the Fair Hearing procedure was completed. On appeal, Vesom responds by stating, "[t]here is significant evidence that the Fair Hearing Panel and the Board of Directors exercised no real authority over the determination to terminate Vesom; rather, they acted

"[W]hen a plaintiff's evidence supports a nondiscriminatory motive for the employer's action and the plaintiff presents no evidence to undermine that motive, summary judgment for the employer is appropriate." *Swackhammer*, 493 F.3d at 1168. Dr. Vesom unquestionably established he was disliked, even hated, by other members of the medical staff and members of the MEC. He also established his renewal application was rejected shortly after he and two other

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perfunctorily," citing generally to *EEOC v. BCI Coca Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484-86 (10th Cir. 2006), *cert. granted*, 127 S.Ct. 852 and *dismissed* 127 S.Ct. 1931 (2007). (Appellant's Br. at 45.) This issue was not raised in the racial discrimination context below. However, we stated in *BCI*:

> [B]ecause a plaintiff must demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee. In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. Indeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory. Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.

Id. at 488 (citation omitted). It is undisputed the Board made its decision only after five independent physicians (not associated with the Hospital) heard arguments and received evidence from Dr. Vesom, through his attorney, at the Fair Hearing. Vesom fails to offers any reason why the causal chain was not broken at this point.

physicians (one Caucasian male and one Palestinian male) complained about the peer review procedures at the Hospital. It is also undisputed that both Dr. Vesom and the Caucasian physician were denied renewal of their privileges. The reasons given to both physicians for the MEC's actions were identical.

Dr. Vesom claims "virtually all of the alleged disruptive activity of Dr. Vesom centered on his attempts to improve the quality of health care at the Hospital, or his complaints that he was being discriminated against because of his race by the Hospital administration." (Appellant's Br. at 44.) While Dr. Vesom may believe his race was a factor, he has not come forth with any evidence of his allegation. Indeed, the only evidence of the MEC's motivations reveals an ongoing and escalating animosity between the independent physicians (including Dr. Vesom) and physicians employed by the Hospital. Because Dr. Vesom failed to submit any admissible evidence of racial discrimination, the district court appropriately granted summary judgment in favor of the Hospital.

D. Sherman Act Claim

Section 1 of the Sherman Act states:

> Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .

15 U.S.C. § 1. To succeed on a Sherman Act claim, a plaintiff must show concerted action and an unreasonable restraint of trade. *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1139 (10th Cir. 1997). An antitrust injury must be analyzed from the consumer's viewpoint. *Mathews v. Lancaster Gen'l. Hosp.*, 87 F.3d 624, 641 (3d Cir. 1996). Thus, Dr. Vesom needs to show the Hospital's conduct "affected the prices, quantity or quality of goods or services, not just his own welfare." *Id.*; *see also Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994). The district court concluded, *inter alia*, Dr. Vesom failed to submit evidence of any anti-trust injury. There was no evidence he had exclusive contracts with his patients or that the Board's decision drove up prices of cardiology service to any patient.

Vesom claims the court's ruling must be reversed because he was denied staff privileges for "the purpose of diminishing the competition for services in the Atchison community." (Appellant's Br. at 45.) However, he fails to cite to record evidence apart from asserting Dr. Rider's testimony established the defendants' "concerted actions produced an anti-competitive effect." (*Id.* at 46.) Assuming these assertions are sufficient to avoid waiving this issue on appeal, they are not enough to establish any error in the court's ruling.

E. Kansas Whistle-Blower Claim

Dr. Vesom claims the district court erred in concluding his status, akin to an independent contractor, precluded his public policy claim against the Hospital under the Kansas whistle-blower law.

"When the federal courts are called upon to interpret state law, the federal court must look to the rulings of the highest state court, and, if no such rulings exist, must endeavor to predict how that high court would rule." *Stickley v. State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070,1077 (10th Cir. 2007) (quotation omitted). The Kansas whistle-blower statute provides as follows:

> (a) No employer shall discharge or otherwise discriminate against any employee for making any report pursuant to K.S.A. 65-4923[16] or 65-4924.
>
> (b)Any employer who violates the provisions of subsection (a) shall be liable to the aggrieved employee for damages for any wages or other benefits lost due to the discharge or discrimination plus a civil penalty in an amount not exceeding the amount of such damages. Such damages and civil penalty shall be recoverable in an individual action brought by the aggrieved employee. If the aggrieved employee substantially prevails on any of the allegations contained in the pleadings in an action allowed by this section, the court, in its

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[16] Kan. Stat. Ann. § 65-4923(a) provides in relevant part:

> If a health care provider, or a medical care facility agent or employee who is directly involved in the delivery of health care services, has knowledge that a health care provider has committed a reportable incident, such health care provider, agent or employee shall report such knowledge . . . .

> discretion, may allow the employee reasonable attorney fees as part of the costs.

Kan. Stat. Ann. § 65-4928. The Kansas Supreme court has authorized a whistle blower action in tort by an at-will employee for retaliatory termination. *See Palmer v. Brown*, 752 P.2d 685 (Kan. 1988). Its rationale for this extension was based in part on public policy grounds. *See id.* at 687-90. The Kansas Supreme court has not addressed whether the statute covers an independent contractor.

Dr. Vesom contends the termination of his staff privileges was based, at least in part, on his complaints to the Board and the Kansas Health Department regarding the Hospital's peer review procedures and professional incompetence of certain doctors. He concedes *Palmer* and the Kansas statutory protections do not reference the status of an independent contractor. However, he urges we apply *Board of County Commissioners, Waubansee County, Kansas v. Umbehr*, which teaches that an independent contractor's entitlement to public policy protections must be resolved in the context of surrounding facts. 518 U.S. 668, 678-81 (1996) (bright-line rule distinguishing between employees and independent contractors leaves Constitutional rights unduly dependant on how the service provider's title is labeled). Dr. Vesom asserts a physician's economic reliance on his relationship with the Hospital constitutes a fact pattern demonstrating an entitlement to whistle-blower protection under public policy considerations and Kansas common law. We decline Vesom's invitation to create state law for Kansas.

The Kansas whistle-blower statute is plain and unambiguous. It clearly provides a medical provider's protection from retaliation by its employer. The plain language does not include independent contractors. Thus, the district court properly refused to extend that protection outside its legislative boundaries. *See Graham v. Dokter Trucking Grp.*, 161 P.3d 695, 703 (Kan. 2007) ("[P]ublic policy is usually the arena of the legislative branch."); *Higgins v. Abilene Mach., Inc.*, 172 P.3d 1201, 1204 (Kan. App. 2007) (issue of public policy is for the legislature to consider in the form of an unambiguous statute); *Palmer*, 752 P.2d at 687-88 ("Before courts are justified in declaring the existence of public policy, . . . it should be so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt.") (quotation omitted). Dr. Vesom does not allege a constitutional violation as was the case in *Waubansee*. He fails to explain why Supreme Court precedent should control a state common law claim or why a federal court should expand state law based on public policy, despite the presence of an unambiguous state statute. While, in the future, Dr. Vesom may be able to persuade the Kansas legislature to modify the existing statutes, it is not our place to create new law for the Kansas legislature or its state courts.

F. Intentional Interference Claim

Kansas recognizes a cause of action for tortious interference with a prospective business advantage or relationship. *Turner v. Halliburton Co.*, 722 P.2d 1106, 1115 (Kan. 1986). "The requirements for this tort [are]: (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendant; (3) that, except for the conduct of the defendant, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct." *Id.* (internal citations omitted). Tortious interference with contractual expectations or a prospective business advantage are predicated on malicious conduct by the defendant and "is aimed at . . . protecting future or potential contractual relations." *Id.*

Vesom complains the district court ruled against him on his interference claim, even though "the termination of his medical staff privileges interfered with his business relations with the thousands of patients he had treated in the 20+ years he practiced in Atchison." (Appellant's Br. at 51.) However, Dr. Vesom does not address the reason the district court ruled against him – he failed to submit actual evidence of interference besides his own conclusory statements. Vesom presented no contractual relationship or exclusive arrangement with his patients on which to base his prospective loss. He proffered no affidavit identifying one person who did not engage Dr. Vesom due to his loss of privileges at the Hospital. On the

other hand, the Association came forward with undisputed evidence that Vesom continued to exercise his staff privileges at the Hospital until April 2004, when the Board accepted the MEC's recommendation. It is also undisputed that, after he left Atchison, Dr. Vesom maintained privileges at Cushing Memorial Hospital in Leavenworth, Kansas (approximately 25 miles from Atchison), and Horton Community Hospital in Horton, Kansas (approximately 20 miles from Atchison). He admittedly continued to see patients at Cushing until his voluntary resignation of his privileges at both hospitals to start a practice in Poplar Bluff, Missouri.

Because Dr. Vesom bears the burden of persuasion regarding his damages at trial, the Association "need not negate [Vesom's] claim." *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007). Rather, the Association need only "point[] out to the court a lack of evidence on an essential element of [Vesom's] claim." *Id.* The Association has done so. Vesom must respond with "specific facts" from which a rational trier of fact could find in his favor. *Id.* "[T]he facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

On appeal, Vesom makes no attempt to meet this burden. His argument to the district court was equally unambitious. He argued, "[p]lainly, plaintiff had a thriving medical practice which was destroyed by defendants' intentional and unlawful misconduct." (R. Vol. I at 355.) This statement is not followed by record cites. Moreover, Vesom's affidavit statement gives no indication that he has suffered damages. Indeed,

there is some evidence in the record demonstrating his new practice in Missouri may be far more lucrative than his Kansas practice. Dr. Vesom's "[c]onclusory allegations . . . do not establish an issue of fact under Rule 56." *Bruner v. Baker*, 506 F.3d 1021, 1025 (10th Cir. 2007). The district court properly granted summary judgment on this claim.

III. CONCLUSION

Because there is no pretext, Dr. Vesom's § 1981 racial discrimination claim fails. With the demise of his § 1981 claim, his § 1985(3) conspiracy claim cannot stand. Dr. Vesom's failure to present any facts supporting damages requires summary judgment be granted in favor of the Association on his Sherman Act claim and his state claim for interference with prospective business relations. We decline to extend or modify Kansas law on public policy grounds, eliminating Dr. Vesom's state whistle-blower claim. Having sufficiently sifted through state law in concluding summary judgment is appropriate on all claims, we need not address Dr. Vesom's waiver under Kansas law.

AFFIRMED.

ENTERED FOR THE COURT

Terrence L. O'Brien
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 04-2218-JAR

[Filed September 22, 2006]

PITT VESOM, M.D., Plaintiff,

vs.

ATCHISON HOSPITAL ASSOCIATION, et al., Defendants.

MEMORANDUM AND ORDER

Plaintiff Pitt Vesom, M.D. filed this action against Atchison Hospital Association ("AHA") and three physicians, Ryan Thomas, M.D., Douglas Goracke, M.D., and Donald Swayze, D.O., who were members of the AHA Medical Executive Committee ("MEC"), and who voted to deny plaintiff's application for reappointment of medical and staff privileges at AHA. Plaintiff contends that the denial of his staff privileges at AHA resulted from an agreement and conspiracy to fabricate reasons for refusing to continue his staff

privileges because he is Asian, he had reported incidents of professional incompetence at AHA, and because defendants prevented or restrained him from practicing medicine in the Atchison community.

The Court now considers the following motions: (1) plaintiff's Motion for Leave to file Declaration and Exhibits under Seal (Doc. 183); (2) defendants' Motion for Summary Judgment (Doc. 161); (3) defendants' Motion to Exclude Declaration and Expert Testimony of John-Henry Pfifferling, Ph.D. (Doc. 142); and (4) defendants' Motion to Exclude Affidavits and Expert Testimony of Kurt V. Krueger, Ph.D. (Doc. 145). As described more fully below, the Court grants plaintiff's Motion for Leave to File Declaration and Exhibits under Seal, grants defendants' Motion for Summary Judgment, and denies as moot both of defendants' motions to exclude expert testimony.

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] A fact is only material under this standard if a dispute over it would affect the outcome of the suit.[2] An issue is only genuine if it "is such that a reasonable jury could return a verdict for the

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[1] Fed. R. Civ. P. 56(c).

[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

nonmoving party."[3] The inquiry essentially determines if there is a need for trial, or whether the evidence "is so one-sided that one party must prevail as a matter of law."[4]

The moving party bears the initial burden of providing the court with the basis for the motion and identifying those portions of the record that show the absence of a genuine issue of material fact.[5] "A movant that will not bear the burden of persuasion at trial need not negate the nonmovant's claim."[6] The burden may be met by showing that there is no evidence to support the nonmoving party's case.[7] If this initial burden is met, the nonmovant must then "go beyond the pleadings and 'set forth specific facts' that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[8] When examining the underlying facts of the case, the Court is cognizant that all inferences must be viewed in the light most favorable to the

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[3] *Id.*

[4] *Id.* at 251–52.

[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[6] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp.*, 477 U.S. at 325).

[7] *Id.*

[8] *Id.*

nonmoving party and that it may not make credibility determinations or weigh the evidence.[9]

When deciding a summary judgment motion, the Court may consider evidence submitted, if admissible in substance, even if it would not be admissible, in form, at the trial.[10] The Tenth Circuit recently explained,

> Parties may, for example, submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in an admissible form. Nonetheless, "the content or substance of the evidence must be admissible." Thus, for example, at summary judgment courts should disregard inadmissible hearsay statements contained in affidavits, as those statements could not be presented at trial in any form. The requirement that the substance of the evidence must be admissible is not only explicit in Rule 56, which provides that "[s]upportingand opposing affidavits shall . . . set forth such facts as would be admissible in evidence," Fed.R.Civ.P. 56(e), but also implicit in the court's role at the summary judgment stage. To determine whether genuine issues of material

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[9] *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

[10] *Argo v. Blue Cross Blue Shield*, 452 F.3d 1193, 1199 (10th Cir. 2006).

fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury.[11]

II. Factual Background

A. Evidentiary Objections

At the outset, the Court notes that significant portions of the voluminous recitation of facts by both parties are immaterial to the resolution of the summary judgment motion. Although they aid in the Court's understanding of the context of the claims made in this case, they do not impact the resolution of claims and affirmative defenses under the applicable summary judgment standard. There are a number of evidentiary issues the Court must resolve before determining the material uncontroverted facts in this matter. In their reply memorandum, defendants move to strike numerous declarations submitted by plaintiff with his response, including plaintiff's own declarations made subsequent to his deposition. Specifically, defendants seek to strike the declarations of Dr. James Rider, Kathy Jackson, Rosetta Birch, Dr. David Ware, and Dr. James Asher on various grounds. Plaintiff filed a separate motion for leave to file his third declaration with exhibits under seal (Doc. 194). In response, defendants argue that the third declaration is irrelevant and a "sham affidavit," and should not be filed for the same reasons that they oppose consideration of plaintiff's second declaration.

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[11] *Id.* (quoting *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995); Fed. R. Civ. P. 56(e)) (citations omitted).

The Court ordered plaintiff to submit this third declaration for *in camera* review so that it may decide those issues. The Court has now reviewedthe declarations in question, as well as reviewed *in camera* plaintiff's third declaration and supporting exhibits by plaintiff.

1. Plaintiff's Declarations

Plaintiff submitted two declarations with his response to the summary judgment motion, titled Vesom Declaration I ("Vesom I") and Vesom Declaration II ("Vesom II"). Plaintiff relies on these declarations to support various factual statements in his response brief. At the time he filed his response, plaintiff also filed a motion to file a third declaration, along with attached exhibits, under seal ("Vesom III"). To be clear, there is no citation in the fact section of plaintiff's response memorandum to Vesom III, although plaintiff does discuss the declaration in the argument section. Defendants ask the Court in their reply to disregard all portions of plaintiff's "affidavit"[12] that are either not based on personal knowledge, or create "sham" fact issues. Defendants also filed a separate response to the motion to file a third declaration under seal on the same grounds.

Sham Affidavit

Defendants argue that Vesom II and III should be stricken because they constitute "sham affidavits,"

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[12] The Court will discuss defendants' objections as applied to both Vesom II and III.

since they were composed long after plaintiff's deposition and attempt to change the answers he gave during that deposition. The Court may not disregard Vesom II and III simply because they conflict with plaintiff's prior sworn statements.[13] But "such evidence may be disregarded when a court concludes that the evidence is merely an attempt to create a sham fact issue."[14] "[T]he utility of summary judgment as a procedure for screening out sham fact issues would be greatly undermined if a party could create an issue of fact merely by submitting [evidence] contradicting his own prior testimony."[15] The Court looks at the following factors to determine if Vesom II or III present a sham fact issue: "whether the [party] was cross-examined during his earlier testimony, whether the [party] had access to pertinent evidence at the time of his earlier testimony, or whether the [contested evidence] was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the [contested evidence] attempts to explain."[16]

Vesom was deposed on March 28 and June 18, 2005. It appears from the transcripts that plaintiff was not cross-examined by his own counsel during the deposition. Discovery was due to be complete in this

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[13] *Martinez v. Barnhart*, 177 Fed. App'x 796, 800 (10th Cir. 2006).

[14] *Id.* (citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986)).

[15] *Franks*, 796 F.2d at 1237.

[16] *Id.*

case on July 15, 2005.[17] Plaintiff argues that the documents attached to Vesom II and Vesom III were not produced to him until May 25, 2005, and that KDHE documents were not made available to him until June 16, 2005, two days before the second day of his deposition. Plaintiff maintains that he "did not know of the content of these records and could not have testified from his personal knowledge of these examples of disparate treatment." The Court agrees that plaintiff could not have answered questions about these documents during his deposition.

Defendants point the Court to one example of plaintiff's attempt to create a sham issue of fact. Defendants argue that during plaintiff's deposition, he itemized instances of alleged discrimination that formed the basis of his Complaint. At the conclusion of the March 28 deposition, counsel for defendants remarked: "Also marked as Vesom Deposition Exhibit No. 114 a one page handwritten notes [sic] that was on the inside cover of Dr. Vesom's version of Vesom Deposition Exhibit No. 101 that he has referred to as an itemized list of the specific instances, I believe of racial discrimination."[18] Plaintiff's counsel responded, "We agree that is Exhibit 114, notes of some of his complaints about discrimination."[19] At the June 18 deposition, plaintiff answered defendants' questions about Exhibit 114. At one point, defendants' counsel

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[17] *See* Doc. 95 at 2.

[18] (Doc. 164, Ex. 35, Vesom Depo. at 306.) The Court is unable to locate this deposition exhibit in the record.

[19] *Id.* at 307.

asked if the exhibit constituted a "full compilation of all the incidents that you believe support the fact that you were racially discriminated against."[20] Plaintiff replied, "That is correct."[21] Defendants argue that Vesom II and III are subsequent attempts to change this answer and create sham fact issues.

The Court declines to find that these affidavits are "sham affidavits" as defendants urge. Defendants seem particularly concerned that plaintiff repeatedly refers to actions that constitute "disparate treatment" of Asian physicians compared to other similarly situated physicians at Atchison Hospital Association. Defendants maintain that "[n]owhere was disparate treatment, or the specific 'examples' and arguments contained in the Declaration, mentioned." The Court is not persuaded by this argument. Plaintiff alleges a number of counts in his Complaint that are based on race discrimination. "'Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race. Proof of discriminatory motive is critical."[22] Disparate treatment is simply a way of referring to intentional discrimination, as compared to disparate impact claims which "involve employment practices that are facially neutral in their treatment of different groups

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[20] (Doc. 164, Ex. 36, Vesom Depo. at 357–58.)

[21] *Id.* at 358.

[22] *Carpenter v. Boeing Co.*, 456 F.3d 1183, 1187 (10th Cir. 2006) (quoting *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)).

but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required."[23] Although the Court sincerely doubts the term "disparate treatment" was originally coined by plaintiff without the guidance of his attorney, the Court finds no impropriety or unfair surprise in its inclusion in the declarations. The question of its materiality will be addressed under the Court's discussion of the substantive discrimination counts, as this evidence primarily points to plaintiff's perceived differences in treatment between himself and other physicians at AHA.

Further, the Court finds that the differences in plaintiff's deposition and his declarations do not amount to the creation of a sham issue of fact. The deposition transcript reveals that plaintiff's counsel clarified at the end of the first day of testimony, that Deposition Exhibit 114 alleged *some* of the instances of discriminatory conduct. Further, unlike most cases that strike an affidavit as improper on these grounds, plaintiff added to an answer given in his deposition, rather than changing his answers entirely. Given that plaintiff was not cross-examined, and that he did not have an opportunity to review many of the documents discussed in his declaration prior to the deposition, the

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[23] *Id.* The Court accepts that plaintiff's claims encompass claims of intentional discrimination. Nothing in the briefs or the pretrial order suggest that plaintiff advances a cause of action encompassing "harassment," as defendants suggest in their Reply. (Doc. 193 at 28.)

Court declines to strike them on the grounds that they constitute sham affidavits.

Personal Knowledge Requirement

Fed. R. Evid. 602 requires that a testifying witness "ha[ve] personal knowledge of the matter" testified to.[24] Also, Fed. R. Civ. P. 56(e) requires that affidavits be made on personal knowledge and "set forth such facts as would be admissible in evidence . . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." "Under the personal knowledge standard, an affidavit is inadmissible if 'the witness could not have actually perceived or observed that which he testifies to.'"[25] Statements of "mere belief in an affidavit must be disregarded."[26]

The Court finds that Vesom II and III contain plaintiff's statements based on personal knowledge; recitations of his attorney's correspondence with defendants; and reaction, beliefs, and opinions concerning certain documents provided to him through discovery in this case. The majority of Vesom II contains plaintiff's arguments about why each document in his credentials file is "manufactured to make it appear that my behavior was inappropriate."

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[24] Fed. R. Evid. 602.

[25] *Argo v. Blue Cross Blue Shield*, 452 F.3d 1193, 1200 (10th Cir. 2006).

[26] *Id.* (quoting *Tavery v. United States*, 32 F.3d 1423, 1427 n.4 (10th Cir. 1994)).

In the course of making this point, plaintiff construes the hospital bylaws, recites exhibits, and makes legal and factual arguments. Often, plaintiff's contentions make reference to "manufactured" or "doctored" documents created by defendants. Vesom III similarly construes documents produced through discovery, but covered by protective order.

The Court disregards the statements in plaintiff's declarations to the extent he attempts to construe and interpret other summary judgment evidence. Such construction and interpretation is not an appropriate task for a witness's affidavit, which is a tool used to present *facts* and not *beliefs* and argument.[27] While the Court will duly consider plaintiff's arguments made in his summary judgment brief—the appropriate forum for argumentation—it will not consider such arguments couched in a party's own affidavit, which should represent pure statements of fact. Instead, the Court construes the summary judgment record under the applicable guidelines and determines if the uncontroverted evidence sufficiently demonstrates a genuine issue of material fact.

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[27] For example, plaintiff's statement that "[t]he failure to give notice also contravened the hospital bylaws and their requirements for dealing with disruptive behavior . . . ." (Doc. 182 ¶ 13), is clearly a conclusory interpretation of other evidence in the record—the Hospital Bylaws. Although this type of legal argument is appropriate for the Court's consideration on the summary judgment motion, it is inappropriate as a submission of fact. Indeed, it appears that much of plaintiff's statement of additional material facts is cut and pasted directly from the witnesses' declarations.

There are many statements in Vesom II and III that are not based on personal knowledge, but are conclusory opinions. Examples of such statements in Vesom II include: "[T]he aforementioned medical staff at AHA . . . conspired to prevent me from practicing at AHA;" and "When I reapplied for privileges at AHA in 1998 . . . my application was treated differently from any other application received prior to or since that date." The Court declines to itemize each and every incidence of such statements, as Vesom II spans fourteen pages and contains sixty-one paragraphs of statements and Vesom III spans three pages with eleven paragraphs of information. The Court will disregard all statements in Vesom II and III that are not supported by other portions of the record, or that do not represent statements based on plaintiff's personal knowledge. The Court will only consider, for purposes of determining the uncontroverted evidence, those statements that plaintiff could have perceived or observed, and will construe the evidence in the light most favorable to plaintiff as the non-moving party. As such, the Court **grants plaintiff's motion to file the declaration and exhibits under seal (Doc. 183) and orders the Clerk's Office to file under seal the declaration and exhibits delivered to the Court for *in camera* review.**

2. Birch and Jackson Declarations

Defendants urge the Court to strike the declarations of Rosetta Birch and Kathy Jackson because they were not properly disclosed under Fed. R. Civ. P. 26. Rule 26(a)(1) requires the parties to provide, without waiting for a discovery request, the name of each person "likely to have discoverable

information that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Under Rule 26(e), the parties are under a duty to supplement these initial disclosures. Sanctions for violating the disclosure rules in Rule 26 are provided for in Rule 37:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(a)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed.[28]

Plaintiff filed an amended witness and exhibit list on February 1, 2005, which did not list either Birch or Jackson as witnesses. Supplemental disclosures under Fed. R. Civ. P. 26(e) were ordered to be served by June 6, 2005. The record does not reveal that an amended witness list or a Notice of Service for supplemental disclosures under Rule 26(e) was filed after the February 1, 2005 disclosures. Birch and Jackson both dated their declarations in January 2006, soon before the response to the summary judgment motion was filed. Plaintiff uses these declarations to support additional material facts in his response to summary judgment. Specifically, plaintiff uses the Birch Declaration to support his contention that certain documents relied upon by defendants in their decision not to renew plaintiff's privileges, contain false

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[28] Fed. R. Civ. P. 37(c)(1).

information. Both declarations are used to support plaintiff's contention that any legitimate reason for the denial of his privileges is a pretext for discrimination. Because these declarations are being used by plaintiff to support elements of his discrimination claims, the Court finds that the failure to disclose Birch and Jackson as potential witnesses, who could then be deposed by defendants, is not harmless.

Under these circumstances, the Court is unable to find that plaintiff was substantially justified in failing to disclose this information. Both witnesses attest that they were employed by AHA for years, during the same period of time that plaintiff was affiliated with the hospital. These are not instances of witnesses who were unknown to the plaintiff. Neither declaration relies upon documents that were not produced prior to the deadline to file supplemental disclosures. Even if these witnesses were discovered after that deadline, Rule 26 imposes a continuing duty upon parties to supplement their disclosures. Certainly, it was feasible for plaintiff to disclose these two witnesses some time prior to when he responded to the summary judgment motion.

Because the Court finds that plaintiff was not substantially justified in withholding this information, and that the failure to disclose was not harmless, the Court grants defendants' motion to strike the Birch and Jackson declarations.

3. Dr. Rider's Declaration

Defendants move to strike Dr. James Rider's first declaration ("Rider I"), because it contains hearsay

statements and is not based on personal knowledge. Much like plaintiff's declarations, Dr. Rider's declaration contains both facts based on personal knowledge, as well as conclusory opinions or beliefs. The Court finds that Dr. Rider's account of the committee meetings he attended are based on personal knowledge. However, his conclusions about how the other members felt toward plaintiff could not be based on personal knowledge.

Alternatively, Dr. Rider's belief that the other committee members were "angry" at plaintiff, as stated in paragraph 2, must be based on things those members told him, which is inadmissible hearsay evidence. Inadmissible hearsay evidence in an affidavit is not to be considered on a motion for summary judgment.[29] However, the Court finds that as a member of the MEC at the time the decision about plaintiff's privileges was made, Dr. Rider does have firsthand, personal knowledge of events that transpired in the meetings that he attended and during the collective decision-making process. Therefore, the Court will only disregard the declaration to the extent it states Dr. Rider's conclusory beliefs about the feelings or intent of others.

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[29] *Treff v. Galetka*, 74 F.3d 191, 195 (10th Cir. 1996); *Ryan v. Shawnee Mission Unif. Sch. Dist. No. 512*, 438 F. Supp. 2d 1233, 1236 (D. Kan. 2006).

4. Dr. Ware's Declaration

Defendants move to strike Dr. David Ware's Declaration because it contains inadmissible hearsay and is not entirely based on personal knowledge. The Court agrees. Paragraphs 2, 3, 4, 5, 7, and 8 all amount to inadmissible hearsay—the witness is recounting statements he heard that were made by other declarants. The Court does not anticipate any exclusion or exception to the hearsay rule that would apply to these statements. Further, Dr. Ware states his opinions about the feelings and attitudes of certain physicians toward plaintiff. The Court will only consider the small amount of Dr. Ware's declaration that is based on admissible evidence and will not consider hearsay statements or statements about Dr. Ware's conclusory opinions.

5. Dr. Asher's Declaration

Defendants move to strike Dr. James Asher's declaration because it is not based on personal knowledge. Dr. Asher was the chief executive officer of AHA for a number of years until his retirement in 1990. He was responsible for recruiting plaintiff to establish a practice in Atchison in 1983. Much of Dr. Asher's declaration is based on information that "he has learned" or that is his "belief."[30] As defendants

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[30] For example, in paragraph 4: "I have learned from staff at AHA . . . ." and " I believe the reduction in the size and function of the ICU is directly related to the termination of [his] staff privileges." In paragraph 5: "It is my belief . . . that the decision to get rid of [plaintiff] was and continues to be economically destructive to the

point out, much of Dr. Asher's statements concern events that occurred after he retired in 1990. There is no basis provided in the declaration for his personal knowledge of these later events. Therefore, because Dr. Asher's declaration relies almost entirely on hearsay and information that Dr. Asher has not acquired through personal knowledge, the Court disregards the majority of the declaration.

6. Authentication of Documents

Defendants argue that many documents filed in support of plaintiff's summary judgment response are not properly authenticated and are therefore inadmissible. Specifically, defendants object to a number of handwritten notes filed as attachments to Vesom II.

> Unauthenticated documents, once challenged, cannot be considered by a court in determining a summary judgment motion. In order for documents not yet part of the court record to be considered by a court in support of or in opposition to a summary judgment motion they must meet a two-prong test: (1) the document must be attached to and authenticated by an affidavit which conforms to rule 56(e); and (2) the affiant must be a competent witness through whom the document can be received into evidence . . . . Documentary evidence for which a proper foundation has not been laid

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hospital . . . ." and "I have learned that . . . the hospital census has been drastically reduced."

> cannot support a summary judgment motion, even if the documents in question are highly probative of a central and essential issue in the case.[31]

The Court agrees with defendants that the handwritten notes attached to Vesom II do not appear to be authenticated under this standard. It appears to the Court that, at the very least, these notes were written by more than one person. These documents could only be authenticated in Vesom II if Vesom himself composed all of these handwritten notes, or if he was familiar with the handwriting.[32] Because Vesom II does not set forth either method of authentication, the Court may not consider these documents.

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[31] *In re Harris*, 209 B.R. 990, 996 (B.A.P. 10th Cir. 1997) (quoting 11 James Wm. Moore, et al., Moore's Federal Practice §§ 56.10[4][c][i], 56.14[2][c] (3d ed. 1997)); *see also Toney v. Cuomo*, 92 F. Supp. 2d 1186, 1196 (D. Kan. 2000), *aff'd*, 221 F.3d 1353 (10th Cir. 2000).

[32] *See* Fed. R. Evid. 901(b).

B. Uncontroverted Facts[33]

The following facts are either uncontroverted, stipulated to, or viewed in the light most favorable to plaintiff. Plaintiff is a medical doctor licensed to practice medicine by the Kansas Board of Healing Arts, certified in the specialties of cardiology and internal medicine. Plaintiff is a citizen of the United States and of Kansas, but was born in Thailand and has Thai ancestry. Defendant AHA is a not-for-profit corporation organized and existing under the laws of the State of Kansas and has its principal place of business in Atchison, Kansas.[34] In 2003, defendants

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[33] In the future, the parties are encouraged to follow the local rules in this district on page limitations, as well as content of briefs, which encourages a *concise* statement of facts. D. Kan. R. 7.1, 7.6 (limiting the argument section of briefs and memoranda to thirty (30) pages if no prior leave of court requested and providing for content of briefs). Moreover, plaintiff's practice of controverting facts with general citations to exhibits, or a general reference to his statement of additional material facts, presents a cumbersome task for the Court in determining the truly uncontroverted material facts in this matter. Given that plaintiff submitted 116 paragraphs of additional facts (many of which are repetitive of facts already narrated by defendants), the Court should not be presumed to glean which statements or general references plaintiff contends specifically controvert the statements made by defendants. Plaintiff's counsel is strongly discouraged from this method of controverting factual statements and the Court declines to conduct a fishing expedition to uncover evidentiary support for plaintiff's contention that certain facts are controverted when not provided with a specific citation to the record. *See* D. Kan. R. 56.1(b).

[34] 42 U.S.C. § 2000d.

Ryan Thomas, M.D., Douglas Goracke, M.D., and Donald Swayze, D.O., were members of the Hospital's MEC. Dr. Thomas is a board certified family practitioner with obstetrical privileges and was the past Chief of Medical Staff. Dr. Goracke is a board certified anesthesiologist and was Chief of Staff at the time. Dr. Swayze is a board certified surgeon and was Vice Chief of Staff at the time.

The Bylaws

The Atchison Hospital Medical Staff Bylaws ("Bylaws") are organized by the medical staff at AHA.[35] They "establish the mechanisms to carry out the direct and delegated responsibilities of the Medical Staff in cooperation with the Hospital Administration and the Governing Board." The Governing Board ("Board") is a group of individuals who constitute the Board of Directors at AHA, "having the ultimate responsibility for the operation of the Hospital and for providing patient care."

The medical staff are practicing and licensed physicians and dentists who have been formally appointed and enjoy the privilege of attending patients at AHA. The Bylaws state that the medical staff agrees to accept and abide by the Bylaws. Under the Bylaws, membership to the medical staff is a privilege and no physician is "entitled to membership to the Medical Staff or to the exercise of particular clinical privileges at the Hospital merely by virtue of the fact

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[35] The parties agree that the December 19, 2002 Bylaws, attached to defendants' motion for summary judgment, govern this dispute.

that he/she . . . has previously had Medical staff membership or privileges in this Hospital." Physicians are appointed medical staff privileges at AHA for a two-year period. After such period is over, physicians must file an application for reappointment if they wish to maintain their privileges.

Disruptive Behavior Provisions

Among other things, the Bylaws dictate that, as a condition to accepting medical staff membership, the member must agree to "conduct him/herself in a professional, cooperative manner with colleagues and members of the Hospital Staff." Also, Article X of the Bylaws dictates AHA's policies concerning medical staff conduct and the impaired provider. This article provides guidelines for medical staff concerning unacceptable disruptive behavior. This list includes, but is not limited to: impertinent and inappropriate comments (or illustrations) made in patient medical records and physicians' orders or other official documents including the impugning of the quality of care in the Hospital or attacking particular individuals, nurses, or Hospital policies; non-constructive criticism addressed to the recipient in such a way that intimidates, undermines confidence, belittles, or implies stupidity or incompetence; refusal to accept medical staff assignments or participate in committee or departmental affairs on anything but his or her own terms or to do so in a disruptive manner; and verbal or physical threats of retribution, litigation or violence directed at individuals, Hospital personnel or patients.

Under Article X, any reports of violations of disruptive conduct or the impaired provider provision must be in writing and submitted and investigated in accordance with Article XII, which governs "Corrective Action." Corrective action requires any report regarding a medical staff member to be made to the Chief of Staff. The procedures set forth for implementation of corrective action in Appendix B provide that upon receiving notice of a reportable incident, including for disruptive behavior, "any officer of the Medical Staff, the chairperson of a Service or Committee, the Chief Executive Officer of the Hospital or any member of the Governing Board of the Hospital may request corrective action against such practitioner." If corrective action is requested, then the MEC investigates the report and submits a written report of the investigation to the Board. Before the report is made, however, the practitioner has the opportunity to interview with the MEC so that he or she may discuss, explain, or refute the nature of the charge. The summary is then submitted with the report to the Board. Ultimately, the Board either approves or modifies the MEC recommendation.

The MEC

The medical staff elects three officers for the purpose of carrying out certain functions on behalf of the staff. These officers are the Chief of Medical Staff, Vice Chief of Staff, and Secretary/Treasurer and they are nominated and elected by the medical staff to serve one-year terms. The Medical Executive Committee ("MEC") consists of these three officers, as well as the immediate past Chief of Staff and a "member at large" elected from the active medical staff annually. In

general, the MEC is charged with overseeing the functions of the medical staff. "Its authority is limited, however, to making recommendations to the Governing Board."[36] The Credentials Committee consists of the members of the MEC and evaluates new applicants to the medical staff, as well as those members applying for reappointment. In 2003, defendants Dr. Thomas, Dr. Goracke, and Dr. Swayze were members of the MEC. At that time, Dr. Thomas was the past Chief of Medical Staff, Dr. Goracke was Chief of Staff, and Dr. Swayze was Vice Chief of Staff. In addition to the defendant, the MEC included Dr. James Rider, who was a member-at-large, and Dr. Michael Jones, who was the Secretary/Treasurer. Neither of these members of the Executive Committee are parties to this dispute.

Application Process and Fair Hearing Procedures

Physicians seeking medical staff membership must apply in writing after a preapplication screening process. The Credentials Committee then collects all of the documentation (licenses, references, etc.) and prepares a report to submit along with the application and supporting material to the Chief of Staff for review by the MEC. The MEC then investigates and makes a recommendation to the Board whether the application should be granted, and if so, if any restrictions should apply. The MEC is to evaluate evidence of character, professional and personal competence, and qualifications and ethical standing of the practitioner

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[36] (Doc. 164, Ex. 4A, Bylaws at 11 ¶ 2.)

before making its recommendation. Finally, the Board reviews the application material and is the ultimate authority in granting a practitioner privileges and decides whether to accept or reject the MEC's recommendation.

Once the period of appointment ends, which is usually after two years, the medical staff member must be reappointed to continue their privileges. The same procedures apply to the reappointment process as the initial appointment process, in addition to the procedures set forth in Appendix A. Section 5(f) of Appendix A provides a list of fourteen criteria upon which the MEC bases its recommendation for reappointment. This criteria includes attendance at medical staff meetings and participation in staff duties; compliance with the Bylaws; and behavior in the Hospital, including cooperation with medical and Hospital personnel. The MEC recommends to the Board whether a staff member's privileges should be increased, reduced, terminated, or remain the same. Finally, the Board reviews the MEC's recommendation and the application materials, and makes the final reappointment decision.

The denial of reappointment by the Board, and/or a recommendation by the MEC to deny reappointment are adverse recommendations that trigger the Fair Hearing Procedure set forth in the Bylaws. Under the Fair Hearing Procedures, the practitioner against whom the decision has been made is given special notice in writing of the recommendation or decision, which must contain a statement of and reasons for the recommendation or decision and inform the practitioner of his or her right to request a hearing.

Appendix A of the Bylaws sets forth the procedures specific to the Fair Hearing. If a hearing is requested, the Chief Executive Officer and/or the Chief of Staff appoints a Hearing Committee, which must be composed of at least five members composed of medical staff or outside physicians who have not been actively involved in the consideration of the matter at previous levels of investigation or consideration.

At the hearing, the practitioner, the MEC and Board may each have counsel present. Each party is entitled to call and examine witnesses, to introduce written evidence, to crossexamine any witnesses, to challenge any witness and to rebut any evidence. The Hearing Committee may consider any pertinent material on file with AHA and any evidence produced at the hearing, including "any information regarding the practitioner who requested the hearing, including, but not limited to, any material contained in the records of the Hospital regarding the practitioner who requested the hearing, so long as such material has been admitted into evidence at the hearing and the affected practitioner had the opportunity to comment thereon, or, by other evidence, to refute it." Appendix A requires the CEO to promptly send a copy of the Hearing Committee's written report of its recommendation to the practitioner and Chief of Staff by certified mail.

Appendix A also allows for a practitioner to appeal an adverse recommendation from the Hearing Committee within ten days. The appeal must be held only on the record upon which the Hearing Committee recommendation was made based on the grounds of: (1) substantial and prejudicial failure on the part of

the Hearing Committee to comply with the Bylaws orrequirements of law; (2) an arbitrary or capricious decision, or decision made with bias; or (3) the action of the Hearing Committee is not supported by evidence in the record. Appellate review is conducted by the Board. The Board then must render a final decision in writing within ten days after the appellate review hearing.

1998 Application

Plaintiff was first granted medical staff privileges at AHA in 1983. He was born in Thailand, came to the United States in 1977, and became a United States citizen in 1996. During his time at AHA, plaintiff and his wife felt socially ostracized by other physicians at AHA. Plaintiff applied for and was granted reappointment every two years after his initial appointment until 1996. On July 22, 1996, plaintiff voluntarily resigned his staff privileges and left the Atchison community and spent a period of time in Thailand. In March 1998, plaintiff returned and applied for appointment at AHA. On October 9, 1998, the MEC recommended that plaintiff not be granted staff membership privileges. Plaintiff requested a fair hearing, but the Board did not follow the MEC recommendation. Instead, the Board offered plaintiff a conditional reappointment, which granted him staff membership on a provisional one-year basis pursuant to a Settlement Agreement.[37] The Settlement Agreement provided for an independent proctor to

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[37] Plaintiff was due for reappointment, however, in two years pursuant to the Bylaws.

review plaintiff's medical records for three months, and to review the manner of practice used by plaintiff, including critiquing care decisions and monitoring the results of care rendered. For nine months, 30% of plaintiff's medical records would be reviewed randomly. The proctor would report his reviews to the CEO, the MEC, and to plaintiff. The Settlement Agreement also required certain departments to submit written reports for the purpose of identifying any problems or concerns that arose regarding plaintiff's interaction with medical and hospital staff. Also part of this agreement is a condition that during plaintiff's provisional period, he is not to be alone with any female employee or patient within the Hospital, except in emergency situations. Finally, the Settlement Agreement releases the parties from any liability or claims that arose before the agreement. The Settlement Agreement provides for AHA's response to inquiries about whether plaintiff's privileges had ever been suspended, revoked, or disciplined:

> On December 19, 1995, Dr. Vesom's clinical privileges were summarily suspended by decision of the Hospital's Chief of Staff and CEO for non-compliance with recommendations of the Kansas Medical Society-Medical Advocacy Program ("KMS-MAP"). Thereafter, the Hospital was informed that Dr. Vesom was in compliance with the recommendations of KMS-MAP. Accordingly, on December 22, 1995 the summary suspension was withdrawn prior to any hearing.[38]

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[38] (Doc. 163, Ex. 38 ¶ 16.)

The Settlement Agreement is signed by plaintiff and by Dr. W. David Drew, President and CEO of AHA at the time.

On February, 27, 2001, plaintiff was notified that his next application for reappointment was approved by the Board. Plaintiff was never an employee of AHA or of the individual defendants.

Plaintiff's Complaints

The Peer Review Committee at AHA performs peer review for the Medical Staff, utilizing criteria and indicators established by the Medical Staff. Under the Bylaws, the Chief of Staff reviews cases and the MEC then performs a screening. The committee meets ten times per year.

On January 3, 2003, plaintiff and Dr. David Ware met with the CEO of the Hospital, Virgil Bourne, and Chief of Staff, Dr. Goracke, about concerns and recommendations they had about certain hospital policies. According to a letter signed by plaintiff, Dr. Ware, and Dr. A.K. Tayiem documenting these concerns, AHA "employees" had been systematically violating the federal and state health rights of its patients for years through its over-reliance on generalist care and sham peer reviews, and blatantly discriminating against the federal rights of independent specialists by sanctioning them "at the behest" of its own generalists. The physicians asked for such changes as, among other things, peer review of major cases by outside reviewers and less political credentialing of physicians. This letter was sent to William R. Thornton, the Chairperson of the Board of

Directors, on January 22, 2003. Thornton responded on January 29, 2003 that he had forwarded the letter on to the Risk Manager for investigation.

On January 23, 2003, the Board of Directors held a meeting where they discussed Dr. Ware's contract. A motion passed unanimously to implement a clause in Dr. Ware's contract that terminates the contract with or without cause upon ninety days written notice. The Board agreed to immediately serve notice of this decision to Dr. Ware by letter.

On March 4, 2003, Mary Kabriel, a risk management specialist with the Kansas Department of Health and the Environment ("KDHE"), Bureau of Health Facilities, arrived at AHA for an unannounced survey due to a report that had been filed against AHA. Later, it became known that Dr. Ware and plaintiff had complained about the handling of a particular case where a mother suffered an amniotic fluid embolism during birth. Dr. Ware and plaintiff were critical of the peer review process in that case and argued for outside peer review. In Vesom I, plaintiff concedes that he filed this report with the KDHE, and that it was not investigated until after he was notified of the denial of his application for reappointment. Kabriel conducted a total of six on-site visits to AHA in March 2003.

2003 Reappointment

When plaintiff applied for reappointment on December 15, 2002, he signed an "Authority and Liability Waiver." The waiver states:

> I further waive any rights under Educational Rights and Privacy Act or any statute granting immunity to such Boards or Committees and further agree to hold harmless such President, Board or Committees evaluating my application from any claim or action by or on my behalf in the event such application for reappointment is denied for any reason.

The waiver is a on a preprinted form and further states that the applicant, "agree[s] to abide by the Bylaws, Rules and Regulations of the Medical/Dental Staff."[39]

In February 2003, the MEC reviewed plaintiff's application and the records from his "credentials file" at AHA. On February 18, 2003, plaintiff was provided a three-page letter signed by CEO Bourne, titled Notice of Adverse Recommendation and Fair Hearing Rights that fully advised plaintiff of his rights under the Fair Hearing provisions of the Bylaws. The reasons for the denial of plaintiff's reappointment stated in the letter are: (1) "failure to comply with Medical Staff Bylaws and Rules and Regulations"; (2) "[his] behavior in the hospital, which showed a lack of cooperation with medical and hospital personnel as it relates to patient care, and the orderly operation of AHA, and [his] general attitude toward AHA and its personnel"; (3) "fail[ure] to discharge [his] responsibilities for Staff, Committee and Hospital functions for which [he] was responsible by staff category assignment, appointment, and election or otherwise"; (4) "[he]

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[39] (Def. Ex. 7.)

engaged in verbal attacks on individuals and AHA personnel that were personal, irrelevant, and went beyond the bounds of fair professional conduct"; (5) "[he] made impertinent and inappropriate comments in official documents, including the impugning of the quality of care in AHA and attacked particular individuals and AHA policies"; (6) "[he] engaged in non-constructive criticism addressed to recipients in such a way as to intimidate, undermine confidence, belittle, or imply stupidity or incompetence"; (7) "[he] refused to accept Medical Staff assignments or participate in committee or departmental affairs on anything but [his] own terms, and did so in a disruptive manner"; (8) "[he] made verbal threats of retribution and litigation towards individuals and AHA personnel including members of the Medical Staff"; and (9) "[he] used abusive language."

On February 24, 2003, the Board of Directors met and the MEC/Credentials Committee informed the Board of their recommendation to give Dr. Ware notice of Termination of his provisional privileges effective March 18, 2003. The MEC/Credential Committee further informed the Board of their recommendation to notify plaintiff of termination of his medical staff membership effective March 18, 2003.

On March 6, 2003, plaintiff delivered a written request for a hearing to the Chief Executive Officer of AHA.[40] The March 6, 2003 letter advised AHA that plaintiff had retained counsel to represent his

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[40] Plaintiff requested a hearing in writing within thirty days of receipt of the February 18, 2003 letter, as provided by the Bylaws.

interests in the matter, and that any questions regarding scheduling of the hearing should be directed to the attention of his attorney, Charles Kugler.

By letter dated March 18, 2003, AHA sent plaintiff a Notice of Hearing stating the place, time, and date of the Fair Hearing. The letter identified five proposed members of the Fair Hearing Panel. Pursuant to the letter, plaintiff was expressly given the right to object to any of the individuals identified to serve on the Fair Hearing Panel with whom plaintiff believed he was in direct economic competition. The letter identified the specific charges made against plaintiff, and included an itemized listing of the specific information upon which the MEC relied in making its recommendation. The letter also identified the witnesses that would be requested to testify at the Fair Hearing in support of the charges against plaintiff.

By letter dated March 21, 2003, plaintiff's legal counsel acknowledged receipt of the March 18, 2003 letter and made written objections to the composition of two of the proposed members of the Fair Hearing Panel.

On June 5, 2003, AHA provided plaintiff's counsel with all of the written exhibits that would be (and were) used at the Fair Hearing in support of the charges against him.[41] Subsequent amended notices of hearing were sent to plaintiff and ultimately the Fair Hearing was scheduled for January 22, 2004. Plaintiff

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[41] This particular fact was stipulated to in the Pretrial Order and will be deemed uncontroverted.

was given a new opportunity to object to the composition of the Fair Hearing Panel in each amended notice. Plaintiff was also provided with another copy of all expected exhibits on January 9, 2004, just prior to the hearing.

The Hearing Panel was composed of five physicians, only one of whom was from Atchison. At the Hearing, plaintiff was represented by Charles Kugler, plaintiff's attorney in this action. The MEC was represented by Andrew Ramirez. Each party had the opportunity to present witnesses and offered testimony to support their case. The witnesses were crossexamined by the other party. The attorneys provided statements of their position at the Hearing. The members of the Fair Hearing Panel were permitted to ask questions of the parties, the witnesses, and the attorneys during the Hearing. Plaintiff presented evidence, including exhibits and documents to the Fair Hearing Panel. The Fair Hearing Panel voted to uphold the MEC's recommendation to not reappoint plaintiff to the medical staff. Dr. Mark Lierz, an adult and pediatric urologist from St. Joseph, Missouri, wrote the report of the Panel's findings as Chair of the Panel. Dr. Lierz noted that plaintiff had "an established pattern of disruptive behavior that created a poor environment for hospital personnel, medical staff, patients and his physician colleagues as he was warned on multiple occasions that this was in direct violation of the Medical Staff Bylaws."

An Appeal Hearing was conducted before the Board on March 25, 2004. Plaintiff was allowed legal counsel and to make oral argument at the hearing. On April 2,

2004, the Board issued its written decision and decided to not reappoint plaintiff to the medical staff, effective April 2, 2004. The Board's decision was based on the recommendation of the MEC and the Hearing Panel.

Between February 18, 2003, when plaintiff received notice of the MEC's adverse recommendation, and April 2, 2004, when the Board issued its decision on appeal, plaintiff had maintained active medical staff privileges at AHA. After his appeal was denied, plaintiff resigned his other medical staff privileges with Cushing Memorial and with Horton County Hospital and decided to relocate to Poplar Bluffs, Missouri.

III. Discussion

Plaintiff asserts in his Complaint the following claims: (1) race discrimination under 42 U.S.C. § 1981; (2) race discrimination under Title VI of the Civil Rights Act of 1964; (3) conspiracy to discriminate under 42 U.S.C. § 1985(3); (4) an antitrust violation under Section 1 of the Sherman Act;[42] (5) retaliatory discharge in violation of Kansas public policy; and (6) intentional interference with business relations under Kansas law. Defendants assert there is no evidence creating a genuine issue of material fact on any of plaintiff's claims and assert various defenses to suit, including waiver. The Court first addresses the substantive claims alleged by plaintiff. Then, the Court will turn to the affirmative defense of waiver.

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[42] 15 U.S.C. § 1.

A. Race Discrimination under Sections 1981 and Title VI

Section 1981, as amended by the Civil Rights Act of 1981, states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit off all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[43]

In a similar vein, Title VI of the Civil Rights Act of 1964 provides that no personal shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI.[44] "[P]rivate individuals may sue to enforce § 601 of Title VI and obtain both

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[43] 42 U.S.C. § 1981(a).

[44] Pub. L. 88-352, Title VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d). The parties have stipulated that AHA is the recipient of federal financial assistance within the meaning of Title VI.

injunctive relief and damages."[45] Title VI only prohibits intentional discrimination.[46]

It is undisputed that plaintiff was not an employee of AHA, nor of the individual defendants. Plaintiff's legal status in relation to defendants is that of an independent contractor.[47] Yet, plaintiff formulates the elements of his Section 1981 claim under the *McDonnell-Douglas Corp. v. Green*[48] burden-shifting framework, normally applicable in employment discrimination cases that involve termination. Defendants object that *McDonnell-Douglas* is inapplicable because plaintiff is not an employee. Defendants also maintain that plaintiff did not have a contractual relationship with AHA, such that would allow for a claim under Section 1981.

In the employment discrimination context, claims brought pursuant to Section 1981 and Title VI are

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[45] *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

[46] *Id.*

[47] *See, e.g.*, *Shah v. Deaconess Hospital*, 355 F.3d 496 (6th Cir. 2004) (applying the common law agency test to determine that plaintiff surgeon was an independent contractor of the hospital, in accord with the Fourth, Seventh, and Fifth Circuits); *McPherson v. HCA-HealthOne*, LLC., 202 F. Supp. 2d 1156, 1164–68 (D. Colo. 2002) (collecting cases). *See generally Lambertsen v. Utah Dept. of Corr.*, 79 F.3d 1024, 1028–29 (10th Cir. 1996) (discussing how to determine employer-employee relationship for purposes of anti-discrimination statutes).

[48] 411 U.S. 792 (1973).

governed by the same evidentiary framework as claims brought under Title VII; that is, in the absence of direct evidence of discrimination,[49] the court applies the burden-shifting scheme of *McDonnell-Douglas* and *Texas Department of Community Affairs v. Burdine.*[50] Under this framework, plaintiff must first prove a prima facie case of race discrimination.[51] If plaintiff is able to sustain this burden, the burden of production shifts to defendants to "articulate a legitimate, nondiscriminatory reason for rejection."[52] If defendants sustain that burden, the burden of production shifts back to plaintiff to show that defendants' proffered reason for rejection is false, or merely a pretext, and the presumption of discrimination created by establishing a prima facie case "drops out of the

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[49] Here plaintiff does not appear to argue that direct evidence of race discrimination is present, as he advocates the *McDonnell-Douglas* burden-shifting framework in the Pretrial Order. Yet, in his sponse, he maintains that certain comments made by "individuals associated with the Hospital," constitute direct evidence of discrimination. As the Court will discuss in more detail when it evaluates pretext, these stray comments are insufficient to support a claim of intentional discrimination.

[50] 450 U.S. 248 (1981); *see Antonio v. Sygma Network, Inc.*, __F.3d__, No. 05-1374, 2006 WL 2361633, at *2 (10th Cir. Aug. 16, 2006); *Maldonado v. City of Altus*, 433 F.3d 1294, 1307 (10th Cir. 2006); *Black Educ. Network, Inc. v. AT & T Broadband, LLC*, 154 Fed. App'x 33, 44 (10th Cir. 2005).

[51] *See Burdine*, 450 U.S. at 252–53; *McDonnell Douglas Corp.*, 411 U.S. at 802.

[52] *See McDonnell Douglas Corp.*, 411 U.S. at 802.

picture."[53] Although the burden of production shifts back and forth between the parties, the ultimate burden of persuasion remains at all times with the plaintiff.[54]

Despite the fact that these claims do not arise in the employment context, the Court may still apply the *McDonnell-Douglas* test for indirect evidence of intentional discrimination.[55] Also, multiple courts have utilized the *McDonnell-Douglas* test for intentional discrimination claims when a physician makes such a claim against hospital entities for suspension or termination of staff privileges.[56]

The Court rejects the formulation of the prima facie case that plaintiff advocates in the Pretrial Order and, instead, would apply the elements of a claim under Section 1981 in the nonemployment context, as articulated by the Tenth Circuit in *Hampton v. Dillard*

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[53] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993)).

[54] *Burdine*, 450 U.S. at 253.

[55] *PAS Commc'ns, Inc. v. Sprint Corp.*, 139 F. Supp. 2d 1149, 1167 (D. Kan. 2001) (collecting cases supporting use of *McDonnell Douglas* in a variety of Section 1981 cases).

[56] *See, e.g., Patel v. Midland Memorial Hosp. & Med. Ctr.*, 298 F.3d 333, 341–344 (5th Cir. 2002), *cert. denied*, 537 U.S. 1108 (2003); *Jeung v. McKrow*, 264 F. Supp. 2d 557, 566–67 (E.D. Mich. 2003); *Van v. Anderson*, 199 F. Supp. 2d 550, 562–70 (N.D. Tex. 2002), *aff'd*, 66 Fed. App'x 524 (5th Cir. 2003).

Department Stores, Inc.[57] Plaintiff must show, (1) he is a member of a protected class; (2) that defendants had an intent to discriminate on the basis of race; and (3) the discrimination interfered with a protected activity as defined in section 1981.[58] Plaintiff claims that defendants interfered with the protected activity of making and enforcing a contract. It is undisputed that plaintiff is a member of a protected class. Defendants seek summary judgment because they argue plaintiff is unable to prove that he had a contract interest that defendants interfered with, and further, that there is no evidence of intentional discrimination.

1. Interference with the Making and Enforcement of a Contract

Under Section 1981(b), to "make and enforce contracts" includes: "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." To state a

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[57] 247 F.3d 1091 (10th Cir. 2001), *cert. denied*, 534 U.S. 1131 (2002). As the Court has already stated, it is uncontested that plaintiff is not an employee of AHA, nor any of the individual defendants. *See Bhatt v. Brownsville Gen. Hosp.*, No. 03-1578, 2006 WL 167955, at *17 n.2 (W.D. Pa. Jan. 20, 2006) (explaining that the prima facie case for wrongful termination is inapplicable in a case where the physician is not an employee of the hospital).

[58] *Hampton*, 247 F.3d at 1101; *see also Patel*, 298 F.3d at 341–44; *Pamintuan v. Nanticoke Memorial Hosp., Inc.*, No. 96-233-SLR, 1998 WL 743680 (D. Del. 1998), *aff'd*, 192 F.3d 378 (3d Cir. 1999). *But see Jeung*, 264 F. Supp. 2d at 568 (applying a modified prima facie case).

claim under Section 1981 for interference with a contract, it must involve, "the actual loss of a contract interest, not merely the possible loss of future contract opportunities."[59] Although most litigation under Section 1981 arises from employment discrimination claims, it has also been applied to claims regarding the retail sector and the restaurant industry if a contract is established.[60]

The parties dispute whether the Bylaws created a contract interest upon which plaintiff may base his Section 1981 claim.[61] Plaintiff points the Court to cases that he believes show that other courts have allowed claims under Section 1981 by physicians who are denied medical staff benefits without proving the existence of a contract. First, plaintiff points the Court to *Jatoi v. Hurst-Euless-Bedford Hospital Authority*,[62] where the Fifth Circuit remanded back to the district court to make specific findings on the elements of the prima facie case and did not speak to the contract issue.[63] Next, plaintiff cites *Islami v. Covenant Medical*

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[59] *Hampton*, 247 .F.3d. at 1104.

[60] *Id.* at 1102.

[61] The Court is unclear about why plaintiff insists that he need not prove he had "vested contract rights." The Court evaluates this prong of the prima facie case as whether he had an enforceable contract interest, as the statute explicitly requires.

[62] 807 F.2d 1214 (5th Cir. 1987).

[63] *Id.* at 1219.

Center,[64] which did not consider a claim under Section 1981, but did find that, under Iowa law, the hospital bylaws created a contract between the defendants and the physician plaintiff in the context of a breach of contract action.[65] The Supreme Court of Iowa later disagreed with that holding.[66] Finally, plaintiffs cite *Janda v. Madera Community Hospital*,[67] which also found that hospital bylaws created a contract between the hospital and the physician plaintiff under California law.[68]

Neither party identifies, nor is the Court able to locate, Kansas law on the issue of whether hospital bylaws create an enforceable contract between the hospital and its medical staff. The closest the Kansas Supreme Court has come to answering this question was in the context of a breach of contract action by a radiologist who sued a hospital for breach of contract based on due process provisions in the hospital bylaws.[69] The Kansas Supreme Court declined to address the issue before this Court, stating: "The

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[64] 822 F. Supp. 1361 (N.D. Iowa 1992).

[65] *Id.* at 1370–71.

[66] *Tredrea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 285–87 (Iowa 1998).

[67] 16 F. Supp. 2d 1181, 1186 (E.D. Cal. 1998).

[68] *Id.* at 1188.

[69] *Dutta v. St. Francis Reg. Med. Ctr., Inc.*, 867 P.2d 1057, 1062 (Kan. 1994).

threshold issue in *Lewisburg* was whether the bylaws formed a contract with the plaintiff radiologist as a member of the medical staff. St. Francis, in this case at bar, has admitted to the contractual relationship."[70] Therefore, the Court must predict how Kansas courts would resolve the issue.

As discussed in the cases cited by plaintiff, there is a split of authority outside of the jurisdiction.[71] It is also difficult to discern a general rule from these cases. Plaintiff quotes *Corpus Juris Secundum* for the proposition that "a hospital's medical staff bylaws constitute a contract between the hospital and its medical staff, particularly where the hospital and its staff indicate an intent to be bound by their terms, but not otherwise."[72] But the revised version of this section states that there is also authority that "absent express language to the contrary, a hospital's medical staff bylaws do not constitute a contract between the hospital and its staff physicians, since the essential element of valuable consideration is absent."[73]

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[70] *Id.* (discussing *Lewisburg Comm'y Hosp. v. Alfredson*, 805 S.W.2d 756 (Tenn. 1991)).

[71] *See Janda*, 16 F. Supp. 2d at 1184–85 (collecting cases); *Islami*, 822 F. Supp. at 1370 (same); *Rahimi v. St. Elizabeth Med. Ctr., Inc.*, No. C3-96-126, 1997 WL 33426269, at *5–7 (S.D. Ohio July 16, 1997); *Kessel v. Monongalia County Gen. Hosp.*, 600 S.E.2d 321, 326 (W. Va. 2004); *Tredrea*, 584 N.W.2d at 285–87.

[72] 41 C.J.S. Hospitals § 16 (1991).

[73] 41 C.J.S. Hospitals § 27 (2006).

The Court concludes that the better-reasoned line of cases hold that hospital bylaws do not create a contract. Like the bylaws discussed in *Tredrea*, the Bylaws here do not imply an agreement for continued staff privileges. In fact, the Bylaws explicitly provide that medical staff privileges are *not* a right and that staff members have *no* entitlement to continued staff privileges.

The preamble to the Bylaws state:

> the physicians and dentists practicing at Atchison Hospital Association, . . . hereby organize themselves in conformity with these Bylaws, which establish the mechanisms to carry out the direct and delegated responsibilities of the Medical Staff in cooperation with the Hospital Administration and the Governing Board of the Hospital, and do hereby agree to accept and abide by the following Bylaws and such Rules and Regulations which are adopted in accord with these Bylaws.

The Court finds that these Bylaws do not create a contract between physicians and the hospital. AHA gave no consideration for any agreement created by the Bylaws, despite the fact that plaintiff was required to abide by them as a consequence of medical staff privileges. Further, the Bylaws are required to be passed by state regulation,[74] so AHA is merely

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[74] *See* K.A.R. 28-34-5a(b).

complying with the law in promulgating Bylaws.[75] The Court finds, like the Supreme Court of Iowa, that construing medical staff bylaws as a contract could actually be contrary to public policy:

> [W]e believe it would improperly impinge on the statutory mandate to the board of directors to establish criteria for staff privileges, perpetuate the problems that had led to the establishment of the independent contractor system, and ultimately affect the successful operation of the hospital. Such a contract, impacting as it would on the statutory responsibilities of the hospital on matters affecting staff qualifications, might well be argued to be against public policy. In any event, we conclude that continued staff privileges are not implied by the bylaws, and we will not give the bylaws the effect of a contract.[76]

The Court agrees with the reasoning of the Supreme Court of Iowa. This Court predicts that under Kansas law, the bylaws do not constitute a contract between medical staff and the hospital. There is a lack of consideration, lack of intent to be bound, and it is contrary to public policy to take away the authority of the Governing Board as "the ultimate authority in the hospital."[77] Accordingly, the Court finds that plaintiff

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[75] *See Kessel v. Monongalia County Gen. Hosp. Co.*, 600 S.E.2d 32, 326 (W. Va. 2004); *Tredrea*, 584 N.W.2d at 285.

[76] *Tredrea*, 584 N.W.2d at 287.

[77] K.A.R. 28-34-5(a); *see* Doc. 163, Ex. 4a at 29 ("The Governing Board of the Hospital shall have the ultimate authority in

is unable to establish a genuine issue of material fact over the third element of a prima facie case, which requires him to show that defendants interfered with the making or enforcement of a contract.

2. Pretext

Assuming *arguendo* plaintiff is able to satisfy the prima facie elements of a Section 1981 and Title VI claim, defendant must offer a legitimate, nondiscriminatory reason for the discrimination. Defendants argue that they abided by the peer review process according to the Bylaws in denying plaintiff's application for reappointment in 2003 because he was a disruptive physician. Plaintiff, in turn, argues that this reason is simply a pretext for discrimination.

The Court finds that defendants offer legitimate, non-discriminatory reasons for denying plaintiff's application for reappointment, and proceeds to determine if this act was a pretext for discrimination. "'A plaintiff can show pretext by revealing such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence.'"[78] Plaintiffs typically show

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granting a practitioner clinical privileges and in all actions concerned with the exercise or limitation of the same.").

[78] *Mickelson v. New York Life Ins. Co.*, __F.3d__, 2006 WL 2468302, at *9 (10th Cir. Aug. 28, 2006) (quoting *Green v. New Mexico*, 420 F.3d 1189, 1192–93 (10th Cir. 2005) (internal quotations omitted)).

pretext in one of these three ways: (1) evidence that defendant's stated reasons for the adverse employment action was false; (2) evidence that defendant acted contrary to a written company policy prescribing the action to be taken by defendant under the circumstances, and (3) evidence that the defendant acted contrary to an unwritten policy or practice when making the decision.[79] Plaintiff also may show pretext through evidence that the "employer's proffered non-discriminatory reasons [were] either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext)."[80] Defendants argue that plaintiff's only evidence of pretext is in the form of his own conclusory opinions, found in his deposition testimony and various declarations. The Court will now turn to each of plaintiff's arguments that the denial of his reappointment based on disruptive behavior was pretextual.

Comments and Conduct

First, plaintiff argues that many physicians, including the individual defendants, made discriminatory comments to him or about him during his tenure at AHA. Yet, he specifically references only two comments in his argument. First, he references a loud comment made by Dr. Harry Franz, now

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[79] *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (quoting *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1230 (10th Cir. 2000)).

[80] *Id.* (quoting *Fuentes v. Perskie*, 32 F.3d 759 764 (3d Cir. 1994)).

deceased, at a barbeque for the hospital employees and physicians, that they should give plaintiff chopsticks to eat with.[81] Second, in his deposition, he talks about how Dr. Eplee "years ago" laughed at his accent while dictating a medical chart, and implied that he spoke slowly. The Court finds that these comments do not amount to either direct evidence of discrimination or of pretext. The comment plaintiff attributes to Dr. Franz, now deceased former member of the Executive Committee, was admittedly made "years ago" and at least some time before 1998.[82] Similarly, the incident with Dr. Eplee occurred many years prior to the decision not to renew plaintiff's privileges. At best, these are discriminatory comments made by nondecision- makers, which carry little evidentiary weight. "Discriminatory incidents which occurred either several years before the contested action or anytime after are 'not sufficiently connected to the employment action in question to demonstrate pretext.'"[83] The contested action here took place in 2003, years after these comments were made sometime prior to 1998. These stray remarks should not even be

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[81] He also references a statement by "a member of Hospital Management" who said that "Dr. Vesom should just go back where he came from." Plaintiff makes no reference to who made this comment, when it was made, or which paragraph of factual assertions or declaration it comes from. The Court has searched the record as is unable to locate the source of this comment.

[82] (Doc. 182, Vesom Depo. at 169, 174.)

[83] *Heno v. Sprint / United Mgmt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000) (quoting *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999)).

admitted on summary judgment, "unless plaintiff can link them to personnel decisions or the individuals making those decisions."[84] Plaintiff makes no attempt to do.

Next, plaintiff argues that he and his wife were socially ostracized by his fellow physicians at AHA and that they refused to refer patients to him for care unless it was an emergency that came up at night or on the weekend. Again, plaintiff does not explain who specifically engaged in this conduct, nor how it related to the ultimate decision to not reappoint him. Plaintiff's deposition testimony indicates that he and his wife were socially excluded by other physicians for a long period of time, beginning years before. Plaintiff enjoyed staff privileges during the majority of this time, and was reappointed after initially being turned down for privileges in 1999 and reappointed in again 2001.

Proffered Reason was Post Hoc Fabrication

Plaintiff argues that Dr. Rider's testimony provides evidence of pretext because he presents an alternate interpretation of the basis for the MEC's decision not to recommend that he be reappointed. According to Dr. Rider, members of the MEC had decided not to

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[84] *Id.*; *see also Van v. Anderson*, 199 F. Supp. 2d 550, 567 (N.D. Tex. 2002), *aff'd*, 66 Fed. App'x 524 (5th Cir. 2003) (explaining that stray remarks and threats were insufficient to establish direct evidence of discrimination); *Patel v. Midland memorial Hosp. & Med. Ctr.*, 298 F.3d 333, 341–344 (5th Cir. 2002), *cert. denied*, 537 U.S. 1108 (2003).

recommend reappointment before actually discussing the grounds for doing so. The Court finds that Dr. Rider's declaration supports the allegation that members of the MEC made the decision not to renew plaintiff's staff privileges before determining a basis upon which to do so. However, Dr. Rider's declaration does not support the allegation that the true reason behind the decision was racial animus.

As previously discussed, the Court disregards this declaration to the extent it provides conclusory opinions about the feelings and intent of others. At best, Dr. Rider's declaration supports the argument that the decision to not reappoint plaintiff to the medical staff was the result of plaintiff's and Dr. Ware's active disagreement with members of the MEC regarding the handling of certain peer review cases. In fact, the only statement made by Dr. Rider that even intimates there was a race-based motivation in deciding not renew plaintiff's privileges is the following paragraph from his second declaration:

> The animus directed at Dr. Vesom by members of the MEC was not the result of disruptive behavior on his part. Rather, it was the result of professional jealously of a better qualified foreign doctor whose competition and demanding standards of care were resented by the hospital employed medical staff doctors.[85]

As described in the Court's evidentiary ruling, this statement amounts to a conclusory opinion to which

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[85] (Doc. 182, Rider Declaration II ¶ 4.)

Dr. Rider cites no supporting facts and for which he has no personal knowledge. Further, both declarations more clearly support his view that the decision not to renew plaintiff's staff privileges was the result of hostility due to plaintiff's and Dr. Ware's complaints about the peer review process at AHA. To be sure, Dr. Rider discusses the letter Dr. Vesom and Dr. Ware wrote on January 22, 2003, criticizing peer review at AHA: "This letter further served to anger my fellow committee members who then decided to not renew the hospital privileges of Dr. Vesom and Dr. Ware."[86] Even though plaintiff provides evidence of an ad hoc fabrication of the reasons behind the denial of his reappointment, the Court finds that he has failed "to create a question of fact for the jury that *race* motivated [the decision]."[87]

Stated Reason for Decision is Contrary to the Bylaws

Although not explicitly referenced in his argument, plaintiff contends in his declarations and factual recitations, that AHA and the MEC did not comply with the Bylaws in denying him reappointment. Specifically, plaintiff maintains that if he was a "disruptive physician" under the Bylaws, he was entitled to "corrective action" under Appendix B when the complaints were made. Instead, plaintiff contends that the MEC reviewed his credentials file that included a number of complaints made during his

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[86] (Doc. 182, Rider Declaration I at 2.)

[87] *Patel*, 298 F.3d at 342 (emphasis in original).

tenure that he never had a chance to explain or refute. Defendants argue that plaintiff was never entitled to corrective action under Appendix B, and that they complied with the Fair Hearing procedures set forth in Appendix A, as the recommendation and ultimate decision not to reappoint plaintiff constituted a triggering action for a Fair Hearing and not for corrective action. Plaintiff's argument appears to be that if the complaints referenced in his credentials file were valid, he would have been accorded corrective action each time a complaint was made. Instead, he claims that the Fair Hearing process was the first opportunity he had to review many of these documents and complaints, and is therefore circumstantial evidence of pretext.

The Court finds that this disagreement is based on a patent misreading of the Bylaws by plaintiff. The Bylaws require allegations of disruption, under the criteria set forth in Article X, to be reported. If a report is made, Appendix B procedures apply for corrective action. However, Appendix B explicitly provides that, "any officer of the Medical Staff, the chairperson of a Service or Committee, the Chief Executive Officer of the Hospital or any member of the Governing Board of the Hospital may request corrective action against such practitioner." If corrective action is requested, then the MEC investigates the report and submits a written report of the investigation to the Board. Before the report is made, however, the practitioner has the opportunity to interview with the MEC so that he or she may discuss, explain, or refute the nature of the charge. The summary is then submitted with the report to the Board. Ultimately, the Board either approves or modifies the MEC recommendation.

Contrary to plaintiff's contentions, this procedure never gets underway unless an officer, Chair of a committee, or the CEO of AHA requests corrective action.

Appendix B does not, by its plain terms, require corrective action be taken every time a report is filed. Therefore, even if plaintiff is correct that the MEC and Board evaluated his credentials file containing allegations that he was never able to explain, this does not contravene the Bylaws. It is clear from the undisputed facts in this matter that defendants complied with the Fair Hearing procedures set forth in Appendix A of the Bylaws, which apply when a member is denied reappointment to the medical staff.

Similarly Situated Individuals

Plaintiff points to his third declaration as proof that similarly-situated Caucasian medical staff members were treated more favorably than he was. A plaintiff may show pretext by proving that similarly situated nonprotected individuals were treated more favorably for committing comparable conduct.[88] "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline."[89] As previously discussed, Vesom III

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[88] *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000).

[89] *Rivera v. City & County of Denver*, 365 F.3d 912, 922-23 (10th Cir. 2004) (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir.1997) (internal quotation marks omitted)).

consists of plaintiff's opinions and explanations of certain confidential documents located in other physicians' credentials files. According to plaintiff, these documents reveal inconsistencies in the treatment of nonprotected physicians compared to him.

Plaintiff attaches "Topic Incident Reports" with regard to two of the physicians, which briefly summarize incidences of problems reported, the physicians' response, and the committee findings, comments, and recommendations. But these reports do not indicate who the "Committee" is, or what procedure the committee went through in order to reach the conclusion it did. There is no evidence presented by plaintiff's third declaration that leads the Court to believe that these reports were reviewed in the context of applications for renewal of medical staff privileges. Nor do all of these reports deal with the same time period, and therefore the same MEC, as the period during which plaintiff applied for and was denied renewal of staff privileges.

Of these two physicians, one was also investigated by the KDHE after it received a complaint from plaintiff in January 2003.[90] The allegation regarded the peer review of a particular medical decision by this physician and the KDHE found the complaint substantiated. The hospital records show that the

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[90] Although not discussed in detail by the parties, this appears to be a separate complaint from the complaint regarding peer review of the maternal mortality after birth, which caused the KDHE to investigate in March 2003.

committee reviewing this allegation reviewed the case as a follow-up to the KDHE survey twice in 2003, and ultimately found the case to be within the standard of care and determined that no further action should be taken. Again, this is not a similarly situated individual to plaintiff. The stated reason for the decision to not reappoint plaintiff was based on a pattern of disruptive behavior, not a complaint over peer review in a particular case.

The third physician plaintiff references in his declaration was up for reappointment in the Fall of 2001. This physician had a documented mental illness and problems with alcohol dependency. Documents attached to plaintiff's declaration show that this information was disclosed to the MEC upon the physician's reapplication and that at least one physician intervened on the physician's behalf and was personally monitoring this physician's performance. The documentation further shows that the MEC addressed these issues with that physician and assured itself that the physician had sought help through an impaired physicians group and was being treated with a number of medications. The Court fails to see how this physician is at all similarly situated to the plaintiff. First, the application was filed in 2001, the same year that plaintiff was reappointed for the last time, without incident. In 2003, a different MEC was in place when plaintiff was not reappointed. Plaintiff has not admitted, nor contended that medical impairments were involved in the decision not to renew his privileges. Further, the issue was not ignored by the MEC, but was discussed with this other applicant and other individuals on the medical staff were monitoring the physician and would report to Dr.

Thomas, Chief of Medical Staff at the time, about this physician's progress. In fact, this appears to be more similar to the circumstances of the MEC's first recommendation in 1998 to deny plaintiff privileges, which was later rejected by the Board, under the conditions set forth in the Settlement Agreement.

Further, defendants have come forward with evidence that Dr. Tayiem, who is Palestinian, also had objections to the peer review process but that his medical staff privileges were unaffected. Dr. Tayiem also signed the letter that plaintiff and Dr. Ware sent to the Board in January 2003. Dr. Tayiem is a much more similarly situated individual to plaintiff, in that he made the same types of complaints and was of a foreign nationality. The fact that Dr. Tayiem did not suffer from a denial of medical staff privilege reappointment belies plaintiff's conclusory allegations that the MEC declined to renew his privileges based on race.

This is a case where summary judgment is appropriate because, "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or . . . the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred."[91] Defendants' motion for summary judgment is granted on plaintiff's Section 1981 and Title VI claims.

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[91] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000).

B. Conspiracy under Section 1985(3)

The essential elements of a claim under Section 1985(3) are: (1) a conspiracy; (2) to deprive plaintiff of equal privileges and immunities; (3) an act in furtherance of the conspiracy; and (4) an injury resulting therefrom.[92] Section 1985(3),

> does not 'apply to all tortious, conspiratorial interferences with the rights of others,' but rather, only to conspiracies motivated by 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus. The other 'class-based animus' language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an economic or commercial bias.[93]

As the Court has already explained, there is no genuine issue of material fact concerning the second element of this claim—an intent to deprive plaintiff of equal privileges or immunities. Plaintiff has failed to present a genuine issue of material fact that would allow a reasonable factfinder to conclude that the decision to not reappoint him to the medical staff was due to an invidiously discriminatory animus. Therefore, summary judgment is granted on this claim.

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[92] *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993).

[93] *Id.* (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)) (citations omitted).

C. Sherman Act

Plaintiff's fourth claim asserts a violation of Section 1 of the Sherman Act. He maintains that defendants conspired to deny him staff privileges at AHA for the purpose of unreasonably restraining trade, causing him to suffer economic losses. Section 1 of the Sherman Act states that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.[94]

Generally, the Sherman Act only prohibits restraints on trade that are unreasonable.[95] The plaintiff must establish: (1) concerted action in the form of a contract, combination, or conspiracy, and (2) an unreasonable restraint of trade.[96]

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[94] 15 U.S.C. § 1.

[95] *Diaz v. Farley*, 215 F.3d 1175, 1182 (10th Cir. 2000) (citing *N.W. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985)).

[96] *Systemcare, Inc. v. Wang Labs. Corp.*, 117 F.3d 1137, 1139 (10th Cir. 1997) (overruling *McKenzie v. Mercy Hospital*, 854 F.2d 365 (10th Cir. 1988)).

"A doctor's unreasonable exclusion from the relevant market via adverse and unfair peer review proceedings obviously affects patient choice and concomitantly, interferes with competition in the marketplace."[97] Normally, courts apply a "rule of reason" analysis to Section 1 cases, which requires "the fact finder [to] weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[98] Under such review, the misuse of the peer review process is unjustified.[99]

Defendants argue that there was no concerted action or conspiracy and that denying staff benefits is not a plainly anti-competitive activity. Plaintiff argues that Dr. Rider's declaration supports the allegation that "concerted actions of defendants" drove plaintiff from the Atchison community, which produced an anti-competitive effect on interstate commerce. Plaintiff argues that he was injured because he was driven from a practice he had developed over a period of more than twenty years.

Dr. Rider's declarations attest to what occurred at certain MEC meetings at which he was present. Taking his declarations as true, plaintiff has established concerted activity among some members of

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[97] *Cohlmia v. Ardent Health Servs., L.L.C.*, _F. Supp. 2d__, 2006 WL 2441942, at *6 (N.D. Okla. Aug. 9, 2006) (collecting cases).

[98] *Diaz*, 215 F.3d at 1182.

[99] *Cohlmia*, 2006 WL 2441942, at *

the MEC.[100] However, as defendants stress, the Board was the ultimate authority who denied plaintiff's reappointment application and plaintiff has come forward with no evidence of concerted action by members of the Board. "Where a hospital Board has ultimate decision making authority, '[s]imply making a peer review recommendation does not prove the existence of a conspiracy [among the hospital and its staff]; there must be something more suchas a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation."[101] Plaintiff has not come forward with any evidence suggesting that the Board did not act independently in following the MEC's recommendation, after the Fair Hearing process was invoked and utilized by plaintiff.[102] The evidence is consistent with AHA's lawful motive of following its Bylaws in denying plaintiff's reappointment. Therefore, plaintiff isunable to present a genuine issue of material fact over whether there was concerted action by defendants and defendants' motion for summary judgment on this claim is granted.

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[100] Based on Dr. Rider's declaration, he did not join in this activity.

[101] *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 639–40 (3d Cir. 1996) (quoting *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696, 706 (4th Cir. 1991)); *see Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1459 (11th Cir. 1991).

[102] *Mathews*, 87 F.3d at 640 (explaining that there must be evidence that excludes the possibility of independent action by the Board).

Also, plaintiff fails to come forward with evidence tending to show an injury to consumers due to the Board's decision. Plaintiff argues that "the evidence" in this case shows anti-competitive activity, without any specific reference to the record. As already discussed, there is no evidence that plaintiff had exclusive contracts with any of his patients, or that the Board's decision drove up prices of cardiology service to patient consumers. To show an antitrust injury, plaintiff would need to show that defendants' conduct "'affected the prices, quantity or quality of goods or services,' not just his own welfare."[103] "A claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up."[104] Plaintiff has not come forward with any evidence, beyond conclusory opinions that certain general physicians refused to refer patients to him, that the decision not to reappoint him affected prices or the quality of goods or services. Even assuming plaintiff's belief about the non-referrals is true, this was happening well before the 2003 decision not to reappoint him. The Court finds no genuine issue of material fact over the existence of an antitrust injury and grants defendant's motion on this claim.

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[103] *Id.* at 641 (quoting *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1991)).

[104] *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994), *cert. denied*, 516 U.S. 1159 (1996).

D. State Law Claims

Defendants further argue that they are entitled to summary judgment on the state law claims on the merits. Because the Court grants summary judgment to defendants on the federal claims, the Court is authorized to decline supplemental jurisdiction over the remaining state law claims.[105] Whether to exercise supplemental jurisdiction is committed to the court's sound discretion.[106] 28 U.S.C. § 1367 "reflects the understanding that, when deciding whether to exercise supplemental jurisdiction, 'a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness and comity.'"[107]

Upon a pretrial disposition of the federal claims, district courts will generally dismiss the state law claims without prejudice.[108] This general practice is in

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[105] 28 U.S.C. § 1367(c)(3).

[106] *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172–73 (1997); *see Anglemyer v. Hamilton County Hosp.*, 58 F.3d 533, 541 (10th Cir. 1995).

[107] *City of Chicago*, 522 U.S. at 173 (quoting *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 (1988)); *see also Gold v. Local 7 United Food & Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998), *overruled on other grounds by Styskal v. Weld County Commr's*, 365 F.3d 855 (10th Cir. 2004).

[108] *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995) (collecting cases); *see also Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1237 (10th Cir. 1997).

keeping with the holdings of the Supreme Court and the Tenth Circuit.[109] "Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary."[110] Nevertheless, in this case, the Court concludes that judicial economy and convenience weigh heavily in favor of exercising supplemental jurisdiction and deciding the state law claims on summary judgment. This case is now two years old and the events forming the basis of plaintiff's state law claims are identical to those already considered by the Court in deciding the federal claims. Therefore, the Court exercises supplemental jurisdiction and proceeds to decide the remaining state law claims.

1. Whistleblower Retaliation

Plaintiff argues that his medical staff privileges were terminated because he reported complaints about peer review and the standard of care at AHA to the KDHE, and was therefore retaliated against for his "whistleblowing" activity. Under Kansas law,[111] there is a so-called whistleblower's exception to the employment-at-will doctrine.[112] The at-will

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[109] *Ball*, 54 F.3d at 669.

[110] *Thatcher Enters. v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990).

[111] The parties do not contest that Kansas law controls the State law claims in this matter.

[112] *Zinn v. McKune*, 949 F. Supp. 1530, 1536–37 (D. Kan. 1996), *aff'd*, 143 F.3d 1353 (10th Cir. 1998).

employment doctrine normally allows for the employer or employee to terminate the employment relationship at any time, for any reason.[113] The Kansas Supreme Court has recognized that "termination of an employee in retaliation for the good faith reporting of a serious infraction of such rules, regulations, or the law by a co-worker or an employer to either company management or law enforcement officials (whistle-blowing) is an actionable tort."[114]

To establish a prima facie case of retaliation for whistleblowing, the plaintiff has the burden to show, (1) a reasonably prudent person would have concluded that the employee's coworker or employer was engaged in activities in violation of rules, regulations, or the law pertaining to public health, safety, and the general welfare, (2) that the employer had knowledge of the employee's reporting of such violation prior to discharge of the employee, and (3) that the employee was discharged in retaliation for making the report.[115] Additionally, the "whistle blowing must have been done out of a good faith concern over the wrongful activity reported rather than from a corrupt motive such as malice, spite, jealousy or personal gain."[116]

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[113] *Id.* at 1536 (citing *Moyer v. Allen Freight Lines, Inc.*, 885 P.2d 391 (Kan. Ct. App. 1995)).

[114] *Palmer v. Brown*, 752 P.2d 685, 690 (Kan. 1988).

[115] *Zinn*, 949 F. Supp. at 1537.

[116] *Id.*

Plaintiff must prove this claim by a preponderance of the evidence that is clear and convincing in nature.[117]

Defendants argue that plaintiff fails to establish a genuine issue of material fact on this claim because (1) he was not an employee of the hospital, (2) the tort does not extend to independent contractors, (3) the claim is preempted by other causes of action in the Complaint, and (4) there is no causation between plaintiff's report to the KDHE and the decision to not reappoint him to the medical staff. Because the Court agrees that plaintiff has failed to come forward with evidence that he was an employee of defendants, his claim fails as a matter of law.

As the Court has already stated, it is undisputed that plaintiff was not an employee of AHA or any of the individual defendants.[118] The Court concluded in its discussion of the discrimination claims that he is properly classified as an independent contractor. In *Parsells v. Manhattan Radiology Group*,[119] Judge Lungstrum recognized that a "clear majority" of cases have held that a claim for retaliation for whistleblowing does not extend to independent contractors.[120] Because the plaintiffs in that case had not addressed the issue in their brief, the court ordered them to show cause why the claim should not

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[117] *Id.* (citing *Ortega v. IBP, Inc.*, 874 P.2d 1188 (1994)).

[118] *See also supra* note 44.

[119] 255 F. Supp. 2d 1217, 1236–37 (D. Kan. 2003).

[120] *Id.* (collecting cases).

be dismissed on those grounds, as it had already found that the plaintiffs were independent contractors and not employees under Title VII. No further order was issued by the court after the parties briefed the issue, however, as a stipulation of dismissal was filed soon after.

Plaintiff argues that *Parsells* should not control here because Judge Lungstrum did not rule on the summary judgment motion as to this tort. While the Court acknowledges that *Parsells* did not grant summary judgment to the defendant on this ground, the court did point to the overwhelming majority position of the courts not to extend whistleblower protection to independent contractors or non-employees. This tort is only an exception to the employment-at-will doctrine and is based on "the wrongful conduct of an entity with the power to terminate the employee."[121] Plaintiff has come forward with no law to the contrary and no evidence that he should be considered an employee,[122] nor does he even contest this point.

Plaintiff's only argument is that medical staff physicians at AHA and employees of the hospital "performed the same services . . . under the same regulatory scheme." The only evidence plaintiff brings forward to support this statement is his own

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[121] *Zinn*, 949 F. Supp. at 1538.

[122] *See, e.g.*, *McPherson v. HCA-HealthOne, LLC.*, 202 F. Supp. 2d 1156, 1164 –68 (D. Colo. 2002) (considering but rejecting the medical staff physician plaintiff's arguments about why he should be considered an employee of the hospital).

declaration.[123] He argues in his declaration that "the only difference is the independent physicians bill for the services directly to the patient or third-party payer, while the Hospital compensates its employed physicians with a salary." But, he argues they are subject to the same rules and regulations. The Court is not persuaded by this evidence. Plaintiff makes no attempt to argue how these facts defeat his independent contractor status, or under what legal theory this cause of action would be applicable to him. They are simply conclusory opinions or beliefs made by him about purely legal arguments.

Defendants met their burden of pointing to the absence of evidence on the point of plaintiff's employment status, yet plaintiff was unable to come forward with evidence that would present a genuine issue of material fact. Because the Court finds that there is no genuine issue of material fact about whether plaintiff was an employee of AHA, it grants defendants summary judgment and declines to address their remaining arguments.[124]

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[123] (Doc. 181 at 22 ¶ 24, citing Vesom II ¶ 2.)

[124] The Court notes, however, that plaintiff's reliance on *Wabaunsee County v. Umbehr* is misplaced. 518 U.S. 668 (1996). That case dealt with distinguishing between employees and independent contractors with regard to First Amendment free speech rights. Certainly, plaintiff must concede that he is advancing a state law claim here that is not constitutional in nature.

2. Intentional Interference with Business Relations

To establish a claim for tortious interference with business relations under Kansas law, plaintiff must show, (1) the existence of a business relationship or expectancy with the probability of future economic benefit to the plaintiff; (2) knowledge of the relationship or expectancy by the defendants; (3) that, except for the conduct of the defendants, plaintiff was reasonably certain to have continued the relationship or realized the expectancy; (4) intentional misconduct by defendant; and (5) damages suffered by plaintiff as a direct or proximate cause of defendant's misconduct.[125] Malice is a predicate for tortious interference.[126]

Under the first element of this tort, plaintiff alleges in the Complaint that he maintained relationships and expectancies with a large number of patients in the Atchison market with the probability of future economic benefit to him from those relationships. Defendants argue that plaintiff has failed to come forward with evidence to support that fact. Plaintiff's response to the summary judgment motion is the conclusory statement, "[p]lainly, plaintiff had a thriving medical practice which was destroyed by defendants' intentional and unlawful misconduct. This

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[125] *E.g., Turner v. Halliburton Co.*, 722 P.2d 1106, 1115 (Kan. 1986).

[126] *L&M Enters., Inc. v. BEI Sensors & Sys. Co.*, 231 F.3d 1284, 1288 (10th Cir. 2000).

point is wholly unsupported by defendants' moving papers."

The only evidence the Court is able to locate on this point is plaintiff's own declaration where he states that he had a thriving medical practice in Atchison that was destroyed when he no longer had a local hospital to which he could refer patients. He states that this "forced" him to move to Poplar Bluffs, Missouri. But plaintiff stated in his deposition that he was allowed to maintain active medical staff privileges during the fourteen month period between receiving notice of the MEC's recommendation and the decision on appeal, until April 2, 2004. Further, it is undisputed that plaintiff still had privileges at two other hospitals, Horton Community Hospital and Cushing Memorial Hospital. Until plaintiff voluntarily moved to Poplar Bluff, Missouri, he continued to treat patients at these hospitals. Nor is there any evidence that plaintiff had an exclusive arrangement with any of his patients.[127]

Plaintiff misapprehends the summary judgment burden. Defendants need only point to the absence of evidence on an essential element of this claim before the burden shifts back to plaintiff to come forward with facts to show a genuine issue of material fact. A

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[127] *See Van v. Anderson*, 199 F. Supp. 2d 550, 565 (N.D. Tex. 2002) (finding no tortious interference with patient contracts where plaintiff admitted in deposition that he continued to admit patients to the hospital after receipt of notice of committee recommendation and that plaintiff did not have exclusive arrangements with patients), *aff'd*, 66 Fed. App'x 524 (5th Cir. 2003).

one paragraph response to this showing is insufficient. The Court finds plaintiff has failed to produce evidence upon which a reasonable factfinder could conclude that plaintiff enjoyed a business relationship or expectancy with his patients.

F. Waiver

Defendants raise a number of defenses to plaintiff's claims in their summary judgment motion. Having granted summary judgment to defendants on all of plaintiff's claims on the merits, the Court need not address each and every defense raised. Out of an abundance of caution, however, the Court proceeds to discuss the affirmative defense of waiver. Defendants argue that all of plaintiff's claims are barred by the Authority and Liability Waiver ("the Waiver") that plaintiff signed on December 15, 2002 when he applied for reappointment to the AHA staff. Plaintiff contends that the cases cited by defendants are inapplicable to an application for medical staff privileges, that waivers of prospective claims for intentional torts or statutory violations are void as against public policy, and that waivers for civil rights violations are "absolutely void." "The existence of a release is an affirmative defense; the defendant bears the burden of establishing it."[128]

Plaintiff relies on a number of cases that stand for the proposition that an employee's rights under Title VII may not be prospectively waived, as it would defeat the "paramount congressional purpose behind

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[128] *White v. Gen. Motors Corp.*, 908 F.2d 669, 672 (10th Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991).

Title VII."[129] Defendants make the overarching argument that because plaintiff was not an employee of AHA or of any of the individually named defendants, he may not now rely upon employment discrimination theories of recovery, such as analogies to Title VII. Although plaintiff does not assert a claim here under Title VII, he does assert race discrimination under Title VI and Sections 1981 and 1985(3).

The issue of the effect of a release or covenant not to sue is a legal question.[130] In Kansas, a release is treated as a contract and a party who signs a written contract "is bound by its provisions regardless of failure to read or understand the terms, unless the contract was entered into through fraud, undue influence, or mutual mistake."[131] As a general rule in Kansas, the court must ascertain the intent of the parties and "if the language of the written instrument is clear, there is no room for rules of construction."[132]

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[129] *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51–52 (1974). However, the Court made clear in *Alexander*, that an employee may waive a cause of action under Title VII as part of a voluntary settlement agreement, so long as the employee's consent to the agreement was knowing and voluntary. *Id.* at 52 n.15.

[130] *See, e.g., Cobb v. Corbett*, 95 P.3d 1028, 1030 (Kan. Ct. App. 2004).

[131] *Dorner v. Polsinelli, White, Vardeman, & Shalton, P.C.*, 856 F. Supp. 1483, 1487 (D. Kan. 1994).

[132] *Marquis v. State Farm Fire & Cas. Co.* , 961 P.2d 1213, 1219 (Kan. 1998) (citing *Simon v. Nat'l Farmers Org., Inc.*, 829 P.2d 884 (1992)).

The waiver provides that plaintiff agrees to "hold harmless such President, Board or Committees evaluating my application from *any claim or action* by or on my behalf in the event such application for reappointment is denied for any reason."[133] Here, the release language specifically states that it includes any claim that could arise from the denial of plaintiff's reappointment for any reason.[134] The Court finds that the language is clear and unambiguous that the release proscribes all claims concerning the denial of reappointment.[135] All of plaintiff's claims are based on the decision not to reappoint him in 2003, and are thus covered by the language in the waiver.

Plaintiff is incorrect that waivers of federal civil rights and intentional tort claims are void as against public policy. An employee may waive potential claims under the civil rights statutes, so long as the waiver is

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[133] (Doc. 164, Ex. 7 (emphasis added)).

[134] *Am. Registry of Radiologic Technologists v. McClellan*, No. 300CV2577K, 2003 WL 22171702, at *2 (N.D. Tex. Mar. 5, 2003) (approving language in a certification application that releases all claims arising out of the application); *see Wright v. Southwestern Bell Tele. Co.*, 925 F.2d 1288, 1292–93 (10th Cir. 1991); *Bohne v. Closings of Tulsa, L.L.C.*, No. 05-0197-TCK-SAJ, 2006 WL 966517, at *4 n.2 (N.D. Okla. Apr. 12, 2006).

[135] *See Bohne*, 2006 WL 966517, at *4–5 (waiving "any known or unknown claim"); *Rodriguez v. Wackenhut Corp.*, No. 00-0264, 2000 WL 825677, at *2 (E.D. La. June 23, 2000) (waiving claims plaintiff "now has or may have in the future"). In this case, "current claims" is somewhat of a misnomer, as the release only applies to future conduct, i.e., in the event reappointment is denied.

made knowingly and voluntarily.[136] However, "[w]aivers of federal remedial rights [], are not lightly to be inferred."[137] To determine if a waiver is knowing and voluntary, courts look beyond the contract language to the totality of the circumstances under which the waiver is signed, considering the following factors:

> (1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether [p]laintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the

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[136] *Torrez v. Pub. Serv. Co. of N.M., Inc.*, 908 F.2d 687, 689 (10th Cir. 1990); *see also Stafford v. Crane*, 382 F.3d 1175, 1180 (10th Cir. 2004); *Reed v. Nellcor Puritan Bennett*, 244 F. Supp. 2d 1205, 1210–12 (D. Kan. 2003); *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000) (applying Kansas law). Likewise, there is no prohibition under Kansas law or in the Tenth Circuit of waivers of intentional torts. *See, e.g.*, *Bennett v. Coors Brewing Co.*, 189 F.3d 1221, 1232–33 (10th Cir. 1999) (concluding scope of release included ADEA and intentional tort claims).

[137] *Torrez*, 908 F.2d at 689.

employee was already entitled by contract or law.[138]

The Court finds, under the totality of the circumstances, that defendants meet their burden of showing no genuine issue of material fact regarding whether the waiver was knowing and voluntary. In addition to the clear language of the release, there is no issue about whether plaintiff knew the implications of the document he signed. He had applied for reappointment multiple times since he began his appointment at AHA in 1983. In 1999, he executed a Settlement Agreement that also contained release language after he was initially denied reappointment by the MEC. There is no evidence that plaintiff did not have adequate time to review the application materials before turning them in. The Court finds under the language of the waiver, as well as the totality of the circumstances, plaintiff waived all claims stemming from the decision in 2003 not to reappoint him to the medical staff. Therefore, even if the Court were to find that any of plaintiff's claims survived summary judgment on the merits, they would be waived.

IV. Motions to Exclude Expert Testimony

The Court declines to address defendants' Motion to Exclude Declaration and Expert Testimony of John-Henry Pfifferling, Ph.D. (Doc. 142); and Motion to Exclude Affidavits and Expert Testimony of Kurt V. Krueger, Ph.D. (Doc. 145). The experts defendants

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[138] *Id.* at 689–90 (quoting *Cirillo v. Arco Chem. Co.*, 862 F.2d 448, 451 (3d Cir. 1988)).

seek to exclude from the Court's consideration were not relied upon by plaintiff at this stage of the proceedings on the issues that were dispositive on summary judgment. Because the Court grants defendants' motion without considering these declarations, the motions to exclude should be denied as moot.

IT IS THEREFORE ORDERED BY THE COURT that:

1. Plaintiff's Motion for Leave to file Declaration and Exhibits under Seal (Doc. 183) is **granted. The Clerk's Office is directed to file plaintiff's third Declaration and exhibits submitted to the Court *in camera* on August 31, 2006;**

2. defendants' Motion for Summary Judgment (Doc. 161) is **granted**; and

3. defendants' Motion to Exclude Declaration and Expert Testimony of John-Henry Pfifferling, Ph.D. (Doc. 142); and Motion to Exclude Affidavits and Expert Testimony of Kurt V. Krueger, Ph.D. (Doc. 145) are **denied as moot.**

IT IS SO ORDERED.

Dated this 22nd day of September 2006.

/S/ Julie A. Robinson
Julie A. Robinson
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CASE NO. 04-2218

[Filed September 22, 2006]

PITT VESOM, M.D.,
Plaintiff,

v.

ATCHISON HOSPITAL ASSOCIATION, et al.,
Defendant.

JUDGMENT IN A CIVIL CASE

DECISION BY THE COURT. Plaintiff filed this action againt Atchison Hospital Association (AHA) and three physicians Ryan Thomas, M.D., Douglas Goracke, M.D., and Donald Swayze, D.O. who voted to deny plaintiff's application for reappointment of medical and staff privileges at AHA. The Court now considers the following motions: (1) plaintiff's Motion or Leave to file Declaration and Exhibits under Seal (Doc. 183); (2) defendants' Motion for Summary Judgment (Doc. 161); (3) defendants' Motion to

Exclude Declaration and Expert Testimony of John-Henry Pfifferling, Ph.D. (Doc. 142); and (4) defendants' Motion to Exclude Affidavits and Expert Testimony of Kurt V. Krueger, Ph.D. (Doc. 145)

IT IS THEREFORE ADJUDGED AND DECREED, pursuant to the Memorandum and Order (doc. 202),

1. Plaintiff's Motion for Leave to file Declaration and Exhibits under Seal (Doc. 183) is **granted. The Clerk's Office is directed to file plaintiff's third Declaration and exhibits submitted to the Court *in camera* on August 31, 2006;**

2. defendants' Motion for Summary Judgment (Doc. 161) is **granted**; and

3. defendants' Motion to Exclude Declaration and Expert Testimony of John-Henry Pfifferling, Ph.D. (Doc. 142); and Motion to Exclude Affidavits and Expert Testimony of Kurt V. Krueger, Ph.D. (Doc. 145) are **denied as moot.**

Date: September 22, 2006

RALPH L. DeLOACH, CLERK

By: Monice K. Crawford
Deputy Clerk